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UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY

	Y	
In re	:	Chapter 11
BED BATH & BEYOND, INC., et al.,	: :	Case No. 23-13359 (VFP)
Debtors	: :	(Jointly Administered)
	X	

DECLARATION OF ERNST A. BELL IN SUPPORT OF OBJECTION OF DALY CITY SERRAMONTE CENTER, LLC TO DEBTORS' MOTION FOR ORDER AUTHORIZING DEBTORS TO ASSUME AND ASSIGN LEASE FOR STORE NO. 301

I, Ernst A. Bell, declare the following:

A. Background

1. I am Vice President, Associate General Counsel for Regency Centers L.P. ("Regency") Regency is the owner of Daly City Serramonte Center, LLC (the "Landlord"), the landlord for the leased premises commonly located at 149 Serramonte Center #150, Daly City, California 94015 (the "Leased Premises") in the shopping center known as Serramonte Center

(the "Shopping Center"), designated by the above-captioned debtors (the "Debtors") as Store No. 3108.

- 2. I received a B.A. in Political Science from the University of Florida in 1992 and a J.D. from the University of Florida College of Law in 1995. I have been employed at Regency since 2009 and have over 14 years of combined experience in real estate and retail. In connection with my role as Vice President, Associate General Counsel, I manage a team of attorneys and paralegals responsible for all Regency litigation, including landlord-tenant matters, bankruptcies, construction issues, and business disputes.
- 3. In connection with my role, I am also one of the custodians of records of the Landlord's books, records, and files that relate to the use and occupancy of retail premises at the Shopping Center. I am personally familiar with the (i) Shopping Center; (ii) Leased Premises; (iii) BBBY Lease (defined below); and (iv) the Ross Lease (defined below). If called upon to testify in this proceeding as to the matters set forth in this declaration, I could and would competently testify thereto, since the facts set forth herein are personally known to me to be true.

B. The Shopping Center & the BBBY Lease

4. Serramonte Center is a highly trafficked shopping center with over 1 million square feet of floor area. Serramonte Center has over 100 retail stores and restaurants, including well-known names such as Macy's, Crunch Fitness, TJ Maxx, Party City, Nordstrom Rack, Target, and Buffalo Wild Wings. The Shopping Center is maintained and managed as a first-class shopping center comparable to other first-class shopping centers in California.¹

¹ BBBY Lease, § 13.1.2.

- 5. Debtor Bed Bath & Beyond, Inc. is the tenant of the Leased Premises pursuant to that certain written lease, dated May 18, 2015 (the "BBBY Lease").² The BBBY Lease is currently set to expire on January 31, 2028, subject to options to extend the term in favor of Tenant.
- 6. The tenant must use the Leased Premises in accordance with the Permitted Uses (as defined in the BBBY Lease) as laid out in Section 1.1.25 of the BBBY Lease. The tenant and Landlord also agreed not to use the Leased Premises in contravention of Section 13.1.1. In exchange, the Landlord granted the tenant exclusive rights to operate within the Shopping Center as more fully described in Section 13.2 of the BBBY Lease.
- 7. On June 30, 2023, the Debtors filed their *Notice of Assumption of Certain Unexpired Leases*, illustrating, *inter alia*, their intent to assume and assign the BBBY Lease (the "<u>Proposed Assignment</u>") to Burlington Coat Factory Warehouse Corporation ("Burlington").³

C. Burlington and Exclusive Use

- 8. On or about February 1, 2016, the Landlord and Ross Dress for Less, Inc. ("Ross") entered into a written Lease Agreement for approximately 27,178 square feet of retail premises located in Serramonte Center (the "Ross Lease").⁴
- 9. The Ross Lease, at section 15.3(a), provides that, without the prior written consent of Ross, Landlord shall not lease space to nor allow any other tenant in the Southwest

A true and correct copy of the BBBY Lease and the amendments and modifications are attached hereto as **Exhibit A**.

Docket No. 1157.

A true and correct copy of the Ross Lease is attached hereto as **Exhibit B**.

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 4 of 64

Quadrant to use more than 15,000 square feet for the primary purpose of the off price sale of merchandise. The Ross Lease further lists Burlington as an example of an off price sale retailer.

- 10. Section 15.3(b) of the Ross Lease provides explicit tenant remedies in the event Landlord violates Ross's exclusivity provision, which include, but are not limited to, the right to terminate the Ross Lease or to pay Substitute Rent (as defined in the Ross Lease).
- 11. As reflected in the Ross Lease, Ross believes Burlington is a direct competitor. Moreover, upon information and belief, Burlington proposes to use the Leased Premises for the purposes of selling off price merchandise.
- 12. Based on the above, the Proposed Assignment, if approved, would violate Section 15.3(a) of the Ross Lease, which would entitle Ross to terminate the Ross Lease or pay the Landlord Substitute Rent, causing the Landlord significant financial harm.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: Jacksonville, FL July 26, 2023

Ernst A. Bell

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 5 of 64

Exhibit A

BBBY Lease

LEASE AGREEMENT

Between

DALY CITY SERRAMONTE CENTER, LLC, A DELAWARE LIMITED LIABILITY COMPANY

Landlord

and

BED BATH & BEYOND INC., a New York corporation,

Tenant

SERRAMONTE CENTER DALY CITY, CALIFORNIA

Dated as of: May 18, 2015

The mailing, delivery or negotiation of this Lease shall not be deemed an offer to enter into any transaction or to enter into any relationship, whether on the terms contained herein or on any other terms. This Lease shall not be binding nor shall either party have any obligations or liabilities or any rights with respect thereto, or with respect to the premises, unless and until both parties have executed and delivered this Lease. Until such execution and delivery of this Lease, either party may terminate all negotiation and discussion of the subject matter hereof, without causes and for any reason, without recourse or liability.

* * * * * *

TABLE OF CONTENTS

		<u>Pag</u>
ARTICLE 1 BASIC	C TERMS AND DEFINITIONS	
Section 1.1	Basic Terms and Definitions	
ADTICLETIES	E OF PREMISES; LEASE TERM; DELIVERY DATE	
Section 2.1	Lease of Premises	
Section 2.1 Section 2.2	Term.	
Section 2.3	<u>Delivery Date.</u>	
Section 2.4	Slack Period	
Section 2.5	Initial Co-Tenancy Condition.	
Section 2.6	Permits Contingency	
ADTICLE 3 IMPDO	OVEMENTS	
Section 3.1	Landlord's Work and Tenant's Work	
Section 3.2	Plan Approvals	
Section 3.2	Performance of Work.	
Section 3.4	Tenant's Leasehold Improvements	
Section 3.5	Tenant's Trailer	
Section 3.6	Tenant Allowance	
Section 3.7	Measurement; Adjustment of Rent	
ADTICLE A EIVER	RENT, PERCENTAGE RENT AND TAXES: DETERMINATION A	VIII)
ARTICLE 4 FLACE	PAYMENTPAYMENT	
Section 4.1	Fixed Rent	
Section 4.1	Payment of Rent	
Section 4.3	Real Estate and Other Taxes.	
Section 4.4	Percentage Rent	
ADTICLE & COM	MON AREAS, THEIR USE AND CHARGES	1.4
Section 5.1	Common Areas: Maintenance	
Section 5.1 Section 5.2	Common Areas: Mannenance Common Areas: Restrictions.	
Section 5.2	Common Areas, Resultings.	1
ARTICLE 6 UTILI	ries	20
Section 6.1	Utility Service	
Section 6.2	Interruption	
ARTICLE 7 SIGNS	21	
Section 7.1	Tenant's Building Signage	21
Section 7.1	Pylon/Monument Signage	
Section 7.3	Signage: Alteration/Removal/Allocation	
Section 7.4	Cooperation	
Section 7.5	Signage and Building Restrictions	
ARTICLE & ALTER	RATIONS AND IMPROVEMENTS	22
Section 8.1	Alterations and Improvements.	
ARTICLE O REPAI	RS	24
Section 9.1	Tenant's Repairs.	
Section 9.1	Landlord's Repairs	
Section 9.3	Legal Compliance Work	
ADTICLE 10 DESC	MAILEICATION INCLIDANCE AND WAINED OF CURROCATION	25
Section 10.1	MNIFICATION, INSURANCE AND WAIVER OF SUBROGATION. Mutual Release, Waiver of Subrogation and Mutual Indemnification	
Section 10.1 Section 10.2	Tenant's Insurance.	
Section 10.2 Section 10.3	Landlord's Insurance	
Section 10.3 Section 10.4	General Insurance Requirements.	
	AND OTHER CASUALTY; EMINENT DOMAIN	
Section 11.1	Fire and Other Casualty	
Section 11.2 Section 11.3	Eminent Domain. Abatement of Rent Charges	
300HOH 11.3	ADDICHICH OF REIL CHAPPES	511

ARTICLE 12 CC	VENANTS, REPRESENTATIONS AND WARRANTIES	
Section 12.1	Quiet Enjoyment	30
Section 12.2	Authority	
Section 12.3	Landlord's Covenants, Warranties and Representations	31
Section 12.4	Environmental Matters	32
ARTICLE 13 US	ES AND RESTRICTIONS	33
Section 13.1	Permitted and Prohibited Uses.	
Section 13.1 Section 13.2	Tenant's Exclusive in Center	
Section 13.2 Section 13.3	Exclusives Which Tenant Must Honor.	
Section 13.3	Exclusives which reliant must Honor.	33
ARTICLE 14 CC	ONDUCT OF BUSINESS OPERATIONS	35
	NANT ASSIGNMENT AND SUBLETTING	
Section 15.1	Assignment and Subletting.	
Section 15.2	Liability of Tenant	37
Section 15.3	Collateral Assignment	
Section 15.4	Cure Rights of Original Tenant.	37
Section 15.5	Recognition Agreement.	38
ARTICLE 16 DE	FAULT AND DISPUTE RESOLUTION	38
Section 16.1	Tenant Default	
Section 16.2	Landlord Default	
Section 16.3	Arbitration	
		40
ARTICLE 17 RIC	GHT TO MORTGAGE AND NON-DISTURBANCE; ESTOPPEL	
~	CERTIFICATE	
Section 17.1	Right to Mortgage and Non-Disturbance	
Section 17.2	Estoppel Certificate	
Section 17.3	Mortgages and Ground Leases	41
ARTICLE 18 NO	TICE	41
ARTICLE 19 TE	NANT'S PROPERTY	41
A DESCRIPTION OF THE	D. OF TENA	
	D OF TERM	
Section 20.1	Surrender of Premises	
Section 20.2	Hold Over	41
ARTICLE 21 [IN	TENTIONALLY DELETED]	42
ARTICLE 22 ON	GOING CO-TENANCY	42
ARTICLE 23 MIS	SCELLANEOUS	42
Section 23.1	Loading Facilities	
Section 23.2	Liens.	
Section 23.2	Broker's Commission.	
Section 23.4	Force Majeure	
Section 23.5	Consents	
Section 23.6	Costs	
Section 23.7	Attorneys' Fees	
Section 23.8	Survival of Obligations	
Section 23.9		
	Non-Waiver	
Section 23.10	Rights Cumulative	
Section 23.11	Definition of Landlord	
Section 23.12	Successors and Assigns	
Section 23.13	Limitation of Landlord's Liability	
Section 23.14	Limitation of Tenant's Liability	
Section 23.15	Joint and Several Liability	
Section 23.16	Severability	
Section 23.17	Grammatical Usages and Construction	
Section 23.18	Table of Contents, Line Numbering and Paragraph Headings	
Naction 22 10		
Section 23.19 Section 23.20	Definition of Hereunder, Herein, etc. Short Form Lease	

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 9 of 64

Section 23.21	Entire Agreement and Modification	45
Section 23.22	No Joint Venture or Partnership Created by Lease	45
Section 23.23	Tenant's Tradename	45
Section 23.24	Counterparts	45
Section 23.25	Waiver of Trial by Jury	
Section 23.26	Ethical Conduct Policy	45
Section 23.27	Confidentiality	45
Section 23.28	Timely Billing of Charges	46
Section 23.29	USA Patriot Act	
Section 23.30	CASP Inspection Civil Code Section 1938	
Section 23.31	Governing Law.	

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 10 of 64

EXHIBITS

Exhibit A	Legal Description of Shopping Center
Exhibit B	Site Plan
Exhibit C	Form of Rent Commencement and Expiration Date Agreement
Exhibit D	Specifications for Landlord's Work
Exhibit D-1	Exterior Elevations of the Premises, and Sidewalk Plan
Exhibit E	Permitted Encumbrances
Exhibit F	Signage
Exhibit G	Form of Subordination, Non-Disturbance and Attornment Agreement
Exhibit H	Form of Subtenant Recognition Agreement
Exhibit I	Form of Delivery Date Notice
Exhibit J	Form of Delivery Date Certification
Exhibit K-1	Existing Exclusives
Exhibit K-2	Existing Leases
Exhibit L	Prohibited Uses
Exhibit M	Form of Mechanics' Lien Indemnification Agreement
Exhibit N	Existing Lease Limitations

1 LEASE AGREEMENT 2 THIS LEASE AGREEMENT ("Lease") is entered into as of Hay 18, 2015 by and 3 between DALY CITY SERRAMONTE CENTER, LLC, a Delaware limited liability company, having an office at 3 Serramonte Center, Daly City, California 94015 ("Landlord"), and BED 4 5 BATH & BEYOND INC., a New York corporation, having an office at 650 Liberty Avenue, 6 Union, New Jersey 07083 ("Tenant"). 7 WITNESSETH: 8 ARTICLE 1 9 BASIC TERMS AND DEFINITIONS 10 Section 1.1 Basic Terms and Definitions. The following terms shall have the 11 meanings set forth in this Section 1.1 except as otherwise expressly provided herein. 12 1.1.1 Additional Rent: Any monies which Tenant is required to pay to 13 Landlord under the terms and conditions of this Lease, other than Fixed Rent. 14 1.1.2 <u>Affiliate</u>: A corporation, partnership, limited liability company, person or 15 other entity which is controlling, controlled by, or under common control with, Landlord or 16 Tenant, as the case may be. As used herein, "control" shall mean the possession, direct or 17 indirect, of the power to direct or cause the direction of the management and policies of a person 18 or entity, whether through the ownership of voting securities or rights, by contract, or otherwise. 19 1.1.1 Alternate Rent: Fifty percent (50%) of the amount of Fixed Rent which 20 otherwise would have been payable under the Lease during the applicable period, it being agreed 21 that Tenant shall pay any Additional Rent due and payable under the Lease during such period. 22 1.1.3 Common Areas: All areas in the Shopping Center which are, from time to 23 time, available for the joint use and benefit of Tenant and other tenants and occupants of the 24 Shopping Center, and their respective employees, agents, subtenants, concessionaires, licensees, 25 customers and other invitees, including, but not limited to, any and all parking areas, parking 26 spaces, driveways, truck serviceways, passageways, sidewalks, entrances, exits, lighting facilities, courts, landscaped areas, retention or detention areas, fencing, directional or safety 27 28 signs, and utility lines serving such common areas and facilities. 29 1.1.4 Common Areas Charges: As defined in Section 5.1 hereof. 30 1.1.5 Delivery Date: As defined in Section 2.3 hereof. 31 1.1.6 Effective Date: The date hereof. 32 Event of Default: As defined in Section 16.1 hereof. 1.1.733 1.1.8 Excused Periods: Periods during which Tenant's failure to conduct the 34 operations of its business or any other business: (x) resulted from alterations or renovations being 35 performed in and to the Premises (not to exceed 120 days), (y) was caused by damage or 36 destruction, eminent domain proceedings or actions, or Force Majeure, or (z) was caused by any 37 act or omission of Landlord, or its employees, agents, or contractors. 38 1.1.9 Exhibits. The exhibits listed in the Table of Contents annexed to this 39 Lease have been agreed to by the parties and attached hereto, it being the intention of the parties 40 that they shall become a binding part of this Lease as if fully set forth herein. 41 1.1.10 Fixed Rent: The following amounts for the periods indicated (subject to 42 adjustment pursuant to Section 3.4 hereof): 43 (a) For the period commencing on the Rent Commencement Date and 44 ending on the first January 31 occurring after the fifth (5th) anniversary of the Rent 45 Commencement Date, at the rate of Five Hundred Four Thousand Seven Hundred Fifty Eight 46 and 00/100 (\$504,758.00) Dollars per year [based on Twenty Three and 00/100 (\$23.00) Dollars 47 per square foot of Floor Area in the Premises];

2 3 4 5	the fifth (5 th) anniversary of the Rent Commencement Date and ending on the last day of the "Initial Term" (defined in Subsection 1.1.41 below), at the rate of Five Hundred Fifty Five Thousand Two Hundred Thirty Three and 80/100 (\$555,233.80) Dollars per year [based on Twenty Five and 30/100 (\$25.30) Dollars per square foot of Floor Area in the Premises];
6 7 8 9	(c) In the event Tenant exercises the first Renewal Option, for the first five (5) year Renewal Period, at the rate of Six Hundred Ten Thousand Seven Hundred Fifty Seven and 18/100 (\$610,757.18) Dollars per year [based on Twenty Seven and 83/100 (\$27.83) Dollars per square foot of Floor Area in the Premises]; and
10 11 12 13	(d) In the event Tenant exercises the second Renewal Option, for the second five (5) year Renewal Period, at the rate of Six Hundred Eighty Three Thousand Eight Hundred Thirty Seven and 36/100 (\$683,837.36) Dollars per year [based on Thirty One and 16/100 (\$31.16) Dollars per square foot of Floor Area in the Premises].
14 15 16 17 18	1.1.11 Floor Area: The actual number of square feet of space contained on all floors within any building area in the Shopping Center (including the Premises). All measurements pursuant to this Section shall be from the exterior of outside walls, doors, windows or store front and/or to the centerline of any common walls, but in no event shall Floor Area within either the Premises or the remainder of the Shopping Center include any non-selling or storage space areas within any mezzanine, lower floor or second floor.
20	1.1.12 Force Majeure: As defined in Section 23.4 hereof.
21 22	1.1.13 <u>Ground Lessor</u> : The landlord under any existing or future ground or underlying leases encumbering or affecting all or any part of the Shopping Center.
23	1.1.14 [Intentionally Deleted].
24	1.1.15 <u>Hazardous Substances</u> : As defined in Subsection 12.4,1 hereof.
25	1.1.16 [Intentionally Deleted].
26	1.1.17 <u>Landlord</u> : As defined in the preamble and Section 23.11 hereof
27 28 29 30 31 32 33 34 35 36	1.1.18 Landlord's Mailing Address: 1600 Northeast Miami Gardens Drive, North Miami Beach, FL 33179, Attn: Legal Department, with a copy to: 3 Serramonte Center, Daly City, CA 94015, Attn: Property Management, or such other place and/or to the attention of such other person as Landlord may notify Tenant from time to time by notice given in accordance with the provisions of Article 18 hereof. If the "Landlord" consists of more than one person, then notices given to the entity listed in Landlord's Mailing Address will be deemed to have been given automatically to all of the parties which constitute Landlord, and Tenant shall be entitled to rely exclusively on any notice sent by said entity. Landlord's Address for the Payment of Rent shall be: Daly City Serramonte Center, LLC, Dept. 3319, Los Angeles, CA 90084-3319.
37	1.1.19 Landlord's Work: As defined in Section 3.1 hereof.
38 39 40	1.1.20 Lease Interest Rate: The then effective prime rate as published from time to time in the "Money Rates" section of <i>The Wall Street Journal</i> (or any successor publication thereto) plus two (2%) percent.
41 42 43 44 45 46	1.1.21 <u>Legal Requirements</u> : All laws, statutes, codes, acts, ordinances, judgments, decrees, authorizations, directions and requirements of, and agreements with, all governmental departments, commissions, boards, courts, authorities, agencies, officials and officers, which now or at any time hereafter may be applicable to the Premises, the Shopping Center, or any part(s) thereof, including, without limitation, the American with Disabilities Act and federal, state, and local governmental interpretations thereof.
47 48 49	1.1.22 <u>Mortgagee</u> : Any lender, which is not an Affiliate of Landlord, and which holds a mortgage on the Shopping Center or is the beneficiary under a deed of trust encumbering the Shopping Center.

1 1.1.23 [Intentionally Deleted] 2 1.1.24 Pad: A compacted graded building pad as more particularly set forth in 3 Exhibit D attached hereto. 4 1.1.25 Permitted Use: the sale (including the incidental rental), at retail of infant, 5 juvenile and children's goods and services, including, but not limited to, a variety (in Tenant's 6 sole discretion as to the mix and proportions) of the following: infant's, juvenile's and children's 7 furniture, furnishings, beds (including, without limitation, mattresses and bedding), changing 8 tables, gliders and rockers (including coordinating ottomans), high chairs, lamps, walkers, play 9 yards, swings, car seats, booster seats, carriages, strollers, cradles, playpens, cribs, toy or 10 clothing chests, stuffed animals, games and toys, bedding accessories, maternity clothing and related items, clothing and accessories for infants, juveniles or children, apparel, layettes, shoes, 11 12 toys, bottles, food or formula for infants, juveniles and children, feeding items, safety items, 13 nursing items, health and beauty care items, food and beverages, drug remedies, diapers, wipes, 14 bathroom and personal care devices and items, indoor or outdoor play and recreational 15 equipment, pacifiers, baby safety items, diaper bags, nursing and bathing items, children's books, 16 pregnancy books, magazines, computer software, audio and video cassettes or tapes, picture 17 frames, portrait studio items and services, party supplies, invitations, greeting cards, gift items, 18 arts and crafts, stationery, teachers' and parents' resources, other educational and multi-media 19 children's items, hair cutting services, fitness center development and learning services, and any 20 and all other items sold or services provided from time to time in any store owned or operated by 21 Tenant or its Affiliate(s) (the aforementioned items are hereinafter collectively referred to as the "Permitted Items"; and for any other lawful retail use not specifically prohibited by the 22 23 provisions of Subsection 13.1.1 below and provided that such other lawful retail use is consistent 24 with the then existing character and quality of the Shopping Center. In addition, Tenant shall be permitted to use portions of the Premises for storage and office uses incidental to the Permitted 25 26 27 1.1.26 Premises: Being the area cross-hatched on Exhibit B hereto, having 28 dimensions as shown on Exhibit B and containing approximately Twenty One Thousand Nine 29 Hundred Forty Six (21,946) square feet of Floor Area, subject to adjustment in accordance with the provisions of Section 3.4 below. In no event shall the building constructed by Tenant contain 30 more than 23,000 square feet of Floor Area (excluding any mezzanine space). Tenant shall have 31 the right, but not the obligation, to construct in the Premises a mezzanine level space containing 32 33 no more than 1,000 square feet for office purposes. In no event shall Tenant be required to pay 34 Rent on such non-selling mezzanine space, if any. 1.1.27 Renewal Option: As defined in Section 2.2.2 hereof. 35 36 1.1.28 Renewal Period(s): Two (2) successive periods of five (5) years each, as provided in Section 2.2.2 hereof. 37 1.1.29 Rent: Fixed Rent and/or Additional Rent. 38 39 1.1.30 Rent Commencement Date: As defined in Section 2.2 hereof. 40 1.1.31 [Intentionally Deleted]. 41 1.1.32 Shopping Center: The shopping center commonly known as Serramonte 42 Center, containing approximately 883,026 square feet of Floor Area as of the date hereof, on the 43 property located at the intersection of Serramonte Boulevard, Callan Boulevard and Interstate 44 280 in Daly City, California and more particularly described in Exhibit A hereto. If Landlord 45 elects to change the name of the Shopping Center, Landlord shall provide Tenant with at least thirty (30) days prior written notice thereof. For purposes of this Lease, the Shopping Center 46 consists of (i) the enclosed interior mall (the "Enclosed Mall"), (ii) the departments stores 47 48 adjacent to the Enclosed Mall and (iii) the Southwest Quadrant. As used herein, the "Southwest 49 Quadrant" shall mean the area delineated on Exhibit B. 50 1.1.33 Substantially Completed or Substantial Completion: The completion of 51 specified work at the Shopping Center (including, without limitation, as applicable, Landlord's 52 Work or Tenant's Work) to the extent that only "Punch List Items" of such work (defined in

Subsection 3.3.3 below) shall not be completed.

1 1.1.34 Taxes: As defined in Section 4.3.3 hereof. 2 1.1.35 Tenant: As defined in the preamble hereof. 3 1.1.36 Tenant's Mailing Address: 650 Liberty Avenue, Union, New Jersey 4 07083, Attn: Mr. Warren Eisenberg, or such other place and/or to the attention of such other person as Tenant may notify Landlord from time to time by notice given in accordance with the 5 6 provisions of Article 18 hereof. 7 1.1.37 Tenant's Permits: As defined in Section 2.3.1(b) hereof. 8 1.1.38 Tenant's Property: All of Tenant's personal property, including, without 9 limitation, phone and alarm systems, satellite antennae, shelving, computers, furniture, cash 10 registers and customer service counters, specialty lighting, track lighting, millwork, conveyor 11 systems, storage racks and signage and any and all other personal property of Tenant which is 12 capable of being removed from the Premises without material damage thereto, but which shall 13 not include electrical systems, heating, ventilation and air conditioning systems, and other 14 mechanical systems, flooring, carpet, elevators, standard lighting and wiring installed within the 15 walls of the Premises. 16 1.1.39 [Intentionally Deleted]. 17 1.1.40 Tenant's Work: As defined in Section 3.1 hereof. 18 1.1.41 Term: A period (the "Initial Term") of approximately ten (10) years 19 beginning on the Rent Commencement Date and expiring at midnight on the last day of January 20 following the tenth (10th) anniversary of the Rent Commencement Date, unless the Rent 21 Commencement Date is February 1, in which event the Expiration Date shall be the day before 22 the tenth (10th) anniversary of the Rent Commencement Date. As used herein: (i) "Term" shall 23 refer to the Initial Term, as the same may be extended by any Renewal Period exercised pursuant 24 to Section 2.2.2 below; and (ii) "Expiration Date" shall mean the date on which the Term 25 expires. 26 ARTICLE 2 27 LEASE OF PREMISES; LEASE TERM; DELIVERY DATE 28 Section 2.1 Lease of Premises. Landlord hereby leases to Tenant, and Tenant 29 hereby leases from Landlord, the Premises together with any and all rights, benefits, privileges 30 and easements, now or hereafter appurtenant to either or both of the Premises and the Shopping Center, arising out of any public or private grant or authority, including, without limitation, the 31 32 non-exclusive right and easement to use the Common Areas in common with other tenants and 33 occupants of the Shopping Center. Landlord acknowledges that following the Effective Date, 34 Tenant intends (but shall not be obligated) to sublease the entire Premises to its wholly owned 35 subsidiary, Buy Buy Baby, Inc., a Delaware corporation ("Baby"), and Landlord agrees to accept 36 performance of Tenant's obligations hereunder by Baby. 37 Section 2.2 Term. 38 2.2.1 Initial Term. Subject to the provisions of this Article 2, the Term of this 39 Lease shall begin on the one hundred eightieth (180th) day following the later of (i) the Delivery 40 Date (hereinafter defined in Section 2.3.1) or (ii) the "Permit Contingency Date" (hereinafter defined in Section 2.6) (the "Rent Commencement Date"). The Term shall expire on the 41 42 Expiration Date, unless earlier terminated as herein provided. When the Rent Commencement Date has been determined, as provided in this Section, Landlord and Tenant shall execute, 43 44 acknowledge and deliver, each to the other, a written statement in the form attached hereto as Exhibit C specifying the Rent Commencement Date, and Landlord shall deliver to Tenant a 45 completed and signed IRS Form W-9 contemporaneously therewith; the delivery of the Form W-46 9 shall be a condition precedent to the payment of Rent. Except as otherwise set forth in Section 47 48 3.2.3 below, this Lease shall be effective and in full force as of the Effective Date, and Tenant 49 shall be responsible for the performance of all terms, covenants and conditions contained in this 50 Lease to be performed during any period that the Tenant is in possession of the Premises before 51 the Rent Commencement Date save and except for the payment of any items of Rent.

1 2.2.2 Renewal Options. Provided no Event of Default then exists either on the 2 date that Tenant exercises its Renewal Option or at the commencement of the applicable 3 Renewal Period, Tenant shall have the right and option (hereinafter a "Renewal Option") to 4 extend the Initial Term from the date on which it would otherwise expire for two (2) successive 5 renewal periods of five (5) years each (individually, a "Renewal Period", and collectively, the 6 "Renewal Periods") upon the same terms and conditions as are herein set forth except that the 7 Fixed Rent shall be as set forth in Section 1.1.10 and any rent free periods, rental concessions, 8 inducements, allowances, Landlord Work and other similar items applicable during the Initial 9 Term will not apply during any Renewal Period. Each Renewal Option shall be exercisable by 10 notice given to Landlord at least one hundred eighty (180) days prior to the commencement of the applicable Renewal Period(s), provided, however, that the Term of this Lease shall not 11 12 expire unless and until Tenant fails to exercise a Renewal Option within fifteen (15) days after 13 receiving notice from Landlord that the Renewal Option in question has not been exercised 14 (Landlord's notice shall not be given prior to the 180th day prior to the Expiration Date), or 15 unless and until Tenant gives notice to Landlord that it will not be exercising any remaining 16 Renewal Options. If Landlord fails to give Tenant such notice prior to the Expiration Date, and 17 Tenant occupies the Premises after the Expiration Date, then Tenant shall remain in possession 18 subject to the provisions of this Lease but without the application of Article 20 hereof. If 19 Landlord then gives Tenant such notice and Tenant exercises its Renewal Option, then the 20 effective date of such exercise shall be retroactive to the Expiration Date. 21 Section 2.3 Delivery Date. 22 2.3.1 <u>Definition</u>. Subject to Landlord's delivery to Tenant of the Delivery Date 23 Notice in accordance with the provisions of Subsection 2.3.2 below and Landlord's timely 24

- 2.3.1 <u>Definition</u>. Subject to Landlord's delivery to Tenant of the Delivery Date Notice in accordance with the provisions of Subsection 2.3.2 below and Landlord's timely compliance therewith, Landlord shall be deemed to have delivered possession of the Pad to Tenant at 8:00 a.m. on the date (the "*Delivery Date*") following the day on which all of the following conditions (the "*Delivery Date Conditions*") shall have occurred <u>and</u> Tenant shall have received from Landlord the Delivery Date Certification in accordance with the provisions of Section 2.3.3 below, which shall constitute Landlord's written certification that all of the following shall have occurred:
- 30 (a) Actual possession of the Pad shall have been delivered to Tenant
 31 free of Hazardous Substances and with all of the Phase A Work (as depicted on Exhibit B and as
 32 defined in Exhibit D) Substantially Completed, which Substantial Completion shall be evidenced
 33 by a written certification by Landlord's architect to Tenant;
 - (b) Landlord shall have obtained (and delivered copies thereof to Tenant, upon request) all site plan and land use approvals required from all applicable third parties and governmental authorities to enable Tenant to construct the improvements on the Pad and to occupy and use the Premises for the conduct of its business in the Premises, which permits and approvals shall include, without limitation, zoning and building code approvals and any environmental requirements (but exclusive of building permits which may be necessary for the performance of Tenant's Work and any business licenses and certificates of occupancy which Tenant may be required to obtain in order to open and operate its business (collectively "Tenant's Permits")),
 - (c) The Common Areas, and, except for the Quadrant Development Work (as hereinafter defined in Section 5.2.2 below), all of the improvements thereto shown on Exhibit B and any site work described in Exhibit D hereto, shall have been Substantially Completed and operational, it being agreed that, subject to Landlord performing any site work as set forth in Exhibit D, if the Common Areas are substantially in the same condition on the Delivery Date as they exist on the Effective Date, Landlord shall be deemed to have satisfied the requirements of this Section 2.3.1(c);
- 50 (d) The representations and warranties of Landlord set forth in subparagraphs (a) through (j) of Section 12.3 below shall then be true and in effect;
 - (e) Landlord shall have delivered to Tenant, in recordable form: (i) a subordination, non-disturbance and attornment agreement substantially in the form attached hereto as <u>Exhibit G</u> executed by each holder of any mortgage or deed of trust encumbering or affecting Landlord's fee interest in and to the Shopping Center or any portion thereof (it being understood and agreed that this Subsection 2.3.1(e) is not intended to extend the date by which

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- Landlord is to deliver to Tenant any document(s) required pursuant to Section 17.3 hereof), and (ii) a fee owner recognition agreement in the form and content described in clause (b) of Section
- 3 17.1 hereof executed by any existing Ground Lessor; and
- (f) Landlord shall have delivered to Tenant the written consent from
 Dick's and any other applicable party having consent or approval rights to permit Tenant (i) to
 have shopping cart corrals pursuant to Section 5.2.8(c) hereof and (ii) to have the staging areas
 for Tenant's Work pursuant to Section 3.3.1 and designated as "*Tenant's Staging*" on Exhibit B
 (it being understood and agreed that this Subsection 2.3.1 (f) is not intended to extend the date by
 which Landlord is to deliver to Tenant the consents required pursuant to Sections 3.3.1 and
 5.2.8(c) hereof).

11 2.3.2 <u>Delivery Date.</u>

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- (a) Landlord shall give Tenant at least thirty (30) days prior notice of the Delivery Date, using the form of Delivery Date Notice attached hereto as Exhibit I (the "Delivery Date Notice"). Landlord's delivery of the Delivery Date Notice shall be a condition precedent to the Rent Commencement Date. Notwithstanding any provision of this Lease to the contrary, in no event shall the Delivery Date be deemed to occur prior to the Delivery Date established in the Delivery Date Notice. No event of Force Majeure occurring prior to the giving of the Delivery Date Notice shall serve to delay the Delivery Date thereby established.
- Landlord acknowledges that if it shall fail to satisfy all of the Delivery Date Conditions by the Delivery Date as established in the Delivery Date Notice, Tenant will sustain substantial, additional costs and expenses, including, without limitation, costs incurred in connection with contractors and subcontractors hired to perform Tenant's Work, the exact amount of which would be impracticable or extremely difficult to ascertain. If the Delivery Date does not occur by the Delivery Date as established in the Delivery Date Notice (subject to, and to the extent of, any net delays ["Tenant Delay"] caused by Tenant's acts or omissions and any net delays caused by Force Majeure, each occurring after the giving of the Delivery Date Notice), then, in lieu of any other remedies available to Tenant for monetary damages under this subparagraph (b) by reason of Landlord's failure to satisfy all of the Delivery Date Conditions by the Delivery Date as established in the Delivery Date Notice. Tenant shall be entitled to a credit against the initial installment(s) of Rent hereunder, as liquidated reimbursement (and not as a penalty) for all of the aforesaid costs incurred by Tenant, an amount equal to One Thousand Two Hundred Fifty Dollars (\$1,250) for each day that the Delivery Date established in the Delivery Date Notice is delayed (the "Liquidated Reimbursement"). The foregoing Liquidated Reimbursement represents the parties' good faith agreement as to an agreed upon amount which shall have been incurred by Tenant and which shall otherwise not be susceptible of exact ascertainment.
- Tenant shall deliver to Landlord written notice (the "Vacate Notice") of the date on which Tenant shall have removed all of its trucks, trailers and other construction equipment and materials from the area in which Landlord shall perform the work designated as the "Phase B Work" on Exhibit B and as defined on Exhibit D (the "Phase B Work"). Landlord shall complete the Phase B Work within sixty (60) days after receipt of Tenant's Vacate Notice (the "Phase B Completion Date"). The completion of the Phase B Work shall be subject to a "walk-through" inspection and compilation of Punch List Items as set forth in Section 3.3.3. Landlord acknowledges that if it shall fail to complete the Phase B Work by the Phase B Completion Date, Tenant will sustain substantial, additional costs and expenses, the exact amount of which would be impracticable or extremely difficult to ascertain. Tenant shall be entitled to a credit against the initial installment(s) of Rent hereunder, as liquidated reimbursement (and not as a penalty) for all of the aforesaid costs incurred by Tenant, an amount equal to One Thousand Two Hundred Fifty Dollars (\$1,250) for each day that the Phase B Work is not completed by the Phase B Completion Date. The foregoing reimbursement represents the parties' good faith agreement as to an agreed upon amount which shall have been incurred by Tenant and which shall otherwise not be susceptible of exact ascertainment.
- (d) Landlord shall complete the work designated as the "Phase C Work" on Exhibit B and as defined on Exhibit D (the "Phase C Work") at some future date as determined by Landlord provided that until the completion of the Phase C Work, Landlord shall maintain appropriate fences or barricades around those unbuilt areas to prevent wind-blown

1 debris and otherwise to maintain the balance of the Shopping Center in a clean and slightly 2 condition. 3 2.3.3 Delivery Date Certification. Upon the satisfaction of all of the Delivery 4 Date Conditions, Landlord shall so certify to Tenant, using the form of Delivery Date 5 Certification attached hereto as Exhibit J. 6 2.3.4 No Waiver. Subject to Punch List Items as contemplated by Section 3.3.3. 7 and Landlord's obligation to correct any latent defects in Landlord's Work of which Tenant has 8 given Landlord notice thereof prior to the first (1st) anniversary of the Delivery Date, Tenant's 9 acceptance of physical possession of the Pad shall be deemed to be an acknowledgment by Tenant that the Delivery Date Conditions have been satisfied (even if, in fact, they have not be 10 11 satisfied); provided, however, that if an item of Landlord's Work which was not apparent on the 12 Delivery Date is incomplete or incorrect or any other of the Delivery Date Conditions is unsatisfied (as the case may be, a "Delivery Failure"), and such Delivery Failure prevents 13 14 Tenant from commencing and/or completing Tenant's Work, then the Rent Commencement Date 15 shall be extended one (1) day for each day that Tenant is unable to commence and/or complete 16 Tenant's Work solely due to the Delivery Failure until the Delivery Failure no longer exists and 17 Tenant is able to commence or resume Tenant's Work. 18 Section 2.4 Slack Period. If the Rent Commencement Date occurs during the 19 months of December, January and February (the "Slack Period"), then Tenant shall have the 20 right to (i) not open for business during such Slack Period in which event Tenant shall not be 21 obligated to pay any Rent or Percentage Rent until the end of such Slack Period or (ii) open for 22 business in which event Tenant shall be entitled to pay Alternate Rent in lieu of Fixed Rent for 23 the period commencing on the Rent Commencement Date and ending on the expiration of the 24 Slack Period (but Tenant shall continue to pay all Additional Rent to the extent required to be 25 paid by Tenant hereunder). Initial Co-Tenancy Condition. 26 Section 2.5 27 2.5.1 As used herein, the "Initial Co-Tenancy Condition" shall mean that (i) 28 two (2) of the Anchor Tenants (as defined below) are not open for business or (ii) less than sixty 29 five percent (65%) of the Floor Area of the Shopping Center (excluding the Floor Area of the 30 Premises, any premises leased to Tenant or any of its Affiliates, the Anchor Tenants, and any 31 new expansion area not built as of the Effective Date) is open and operating by tenants typically 32 found in similar shopping centers in California. As used herein, an "Anchor Tenant" shall mean 33 Macy's, Target, Dick's Sporting Goods and JC Penney or a national or regional replacement 34 tenant therefor typically found in similar shopping centers in California which operates at least 35 85% of the Floor Area occupied by such named tenants as of the Effective Date (or in the case of 36 Macy's, at least 100,000 square feet of Floor Area, and in the case of Dick's, at least 40,000 37 square feet of Floor Area). 38 2.5.2 If, on the Delivery Date, the Initial Co-Tenancy Condition has not been 39 satisfied, Tenant shall have the right, at its sole option, to: 40 accept delivery of physical possession of the Pad; or (a) 41 (b) defer its acceptance of delivery of physical possession of 42 the Pad to a later date (but not later than the date on which the Initial Co-Tenancy Condition is satisfied and Tenant receives notice from Landlord thereof), whereupon the Delivery Date shall 43 44 be deemed to have occurred on the earlier of the date on which Landlord tenders delivery of the 45 Pad in compliance with the terms of this Lease or Tenant actually accepts physical possession of the Pad (subject to the other provisions of this Article 2 and the continuing satisfaction of the 46 47 Delivery Date Conditions), it being agreed, however, that if Tenant elects to defer its acceptance 48 of delivery of the Pad for more than one (1) year, Landlord shall thereafter have the right to 49 terminate this Lease upon thirty (30) days' notice to Tenant, except Tenant may nullify 50 Landlord's termination right by accepting delivery of the Pad within such thirty (30) day period; 51 and 52 in either event, if the Rent Commencement Date occurs before the satisfaction of the Initial Co-

Tenancy Condition, Tenant shall be entitled to pay Alternate Rent in lieu of Fixed Rent until the

Initial Co-Tenancy Condition is satisfied and the Landlord gives Tenant notice thereof, subject to any other applicable provisions of this Article 2.

2.5.3 In addition to the provisions of Section 2.5.2 above, if the Initial Co-Tenancy Condition has not been satisfied by the first (1st) anniversary of the Delivery Date established pursuant to Section 2.3.2(a) above, then Tenant shall have the right, within one hundred twenty (120) days after such one (1) year anniversary, upon giving Landlord at least sixty (60) days' prior notice, to terminate this Lease as of the date specified in said notice. Landlord may negate such termination by causing the Initial Co-Tenancy Condition to be satisfied within thirty (30) days after the date on which said termination notice is given. If this Lease is terminated hereunder, neither party shall have any further liability under this Lease, except: (i) for those obligations which survive the expiration or other termination of this Lease pursuant to the express terms of this Lease, and (ii) Landlord shall promptly reimburse Tenant for all of its reasonable third-party costs and expenses incurred in connection with this Lease, including, without limitation, costs associated with the preparation and review of plans and specifications, attorney's fees, and the performance of Tenant's Work, not to exceed Thirty Seven Thousand Five Hundred Dollars (\$37,500). If Tenant does not terminate this Lease pursuant to this Section 2.5.3, then commencing on the expiration of the aforesaid 120-day period, Tenant shall resume paying full Rent.

Section 2.6 Permits Contingency.

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2.6.1 Tenant shall make application for Tenant's Permits (defined in Section 2.3.1(b) above) within thirty (30) days after the later to occur of (i) the date upon which Landlord has approved (or has been deemed to have approved) Tenant's Plans pursuant to the provisions of Section 3.2 hereof and (ii) Tenant's receipt of notice from Landlord that the Land Use Approvals Contingency Date (as defined in Section 3.1 below) shall have occurred and Tenant shall thereafter diligently prosecute such application(s) until approved. Tenant shall keep Landlord reasonably apprised of the status of its application and agrees to promptly notify Landlord upon obtaining Tenant's Permits. Notwithstanding the provisions of this Article 2 to the contrary, if, despite Tenant's diligent efforts, all Tenant's Permits have not been obtained within one hundred eighty (180) days after the date on which Tenant filed such application (the "Application Date"), Tenant shall have the right, upon notice given to Landlord prior to the unconditional grant of all of Tenant's Permits, to: (a) delay its acceptance of physical possession of the Premises to the date on which all of the Tenant's Permits have been obtained, whereupon the Delivery Date shall be deemed to have occurred on such date (subject to the other provisions of this Article 2 and the continuing satisfaction of the Delivery Date Conditions); or (b) subject to Landlord's right to seek Tenant's Permits on Tenant's behalf pursuant to Section 2.6.2 below, terminate this Lease. Tenant's exercise of its rights under (a) above shall not preclude the subsequent exercise of its rights under (b) above. The date on which all Tenant's Permits are unconditionally granted is referred to herein as the "Permit Contingency Date" and Tenant shall give Landlord written notice of such date. For purposes of defining whether Tenant's Permits are "unconditional," Tenant acknowledges that Tenant's Permits shall be deemed to be without condition (i.e. unconditional) if the only conditions or requirements that are imposed on Tenant are those that are routinely and customarily imposed on all tenants that are issued such permits.

2.6.2 If Tenant elects to terminate this Lease pursuant to section 2.6.1 above or if all Tenant's Permits have not been obtained within two hundred seventy (270) days after the Application Date, Landlord shall have the right, for a period of ninety (90) days, to obtain Tenant's Permits at Landlord's cost and expense, provided Landlord obtains Tenant's prior written consent to any submission or application and neither such submission or application and/or subsequent meetings or correspondence with applicable governmental authorities changes Tenant's Plans without Tenant's prior consent, which consent may be withheld in Tenant's sole discretion. In addition, if all of Tenant's Permits have not been obtained within three hundred sixty-five (365) days after the Application Date for any reason other than Landlord's failure to perform or observe any of its obligations under this Lease, then Landlord shall have the option, upon notice given to Tenant prior to the unconditional grant of all Tenant's Permits, to terminate this Lease, provided, however, that Tenant shall have the right to avoid Landlord's termination by giving notice to Landlord, within fifteen (15) days after receiving Landlord's termination notice, of Tenant's waiver of its rights under Section 2.6.1 above, whereupon Landlord's termination notice shall be rendered null and void.

2.6.3 In the event Tenant or Landlord elects to terminate this Lease pursuant to this Section 2.6, this Lease shall cease and be deemed canceled and terminated as of the date set forth in Tenant's or Landlord's notice of such termination and upon such termination, Tenant and Landlord shall be relieved of any and all further liability hereunder, except for those obligations which survive the expiration or other termination of this Lease pursuant to the express terms of this Lease.

ARTICLE 3 IMPROVEMENTS

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Section 3.1 Landlord's Work and Tenant's Work. (a) Landlord is in the process of seeking the site plan and land use approvals required from all applicable third parties and governmental authorities to enable Landlord to perform Landlord's Work and to enable Tenant to construct the improvements on the Pad and to occupy and use the Premises for the conduct of its business in the Premises, which permits and approvals shall include, without limitation, zoning and building code approvals and any environmental requirements (the "Required Land Use Approvals"). Landlord shall keep Tenant reasonably apprised of the status of obtaining the Required Land Use Approvals and agrees to promptly notify Tenant upon its receipt of same. If, despite Landlord's diligent efforts, the Required Land Use Approvals have not been obtained by July 1, 2016, either Landlord or Tenant shall have the right, upon notice given to the other prior to the receipt of the Required Land Use Approvals to terminate this Lease in which event Landlord shall promptly pay to Tenant an amount not to exceed \$25,000 (based upon Tenant's documented out of pocket expenses) for Tenant to prepare shell footprint and elevation drawings in connection with Landlord's application for the Required Land Use Approvals and an additional amount not to exceed \$50,000 (based upon Tenant's documented out of pocket expenses) if Landlord shall have requested Tenant in writing to prepare Tenant's Plans (as defined in Section 3.2 hereof) prior to Landlord's receipt of the Required Land Use Approvals. The date on which the Required Land Use Approvals are obtained is referred to herein as the "Land Use Approval Contingency Date". Subject to the receipt of the Required Land Use Approvals and Landlord's receipt of any building permits which may be necessary for the performance of Landlord's Work, Landlord shall, at its sole cost and expense, perform the work and obligations described on Exhibit D ("Landlord's Work"), and shall deliver possession of the Pad to Tenant in the condition described therein. Except for Landlord's Work, Tenant shall, at its own cost and expense, do any and all work (hereinafter referred to as "Tenant's Work") which Tenant desires to adapt the Pad to Tenant's use, including, without limitation, installing final utility connections and utility meters. Landlord has advised Tenant of the existence of certain limitations contained in Existing Leases, as more particularly set forth in Exhibit N (the "Existing Lease Limitations"). Subject to Landlord obtaining the consent from Dick's pursuant to Section 2.3.1(g) above, Tenant hereby agrees to abide by and comply with the Existing Lease Limitations in connection with its performance of Tenant's Work provided, however, that notwithstanding the foregoing, Exhibit B attached to this Lease shall control over the Dick's site plan attached to Exhibit N. Notwithstanding anything to the contrary contained in this Section 3.1(a), if the Required Land Use Approvals change or alter, except to an immaterial degree, Exhibit B, Exhibit D-1 (including, without limitation, the height or dimensions of the Premises as shown on the LOD or Tenant's signage as indicated thereon), Exhibit F, the Critical Access Ways (as defined in Section 5.2.2 hereof), the number, location or layout of parking within the Critical Area (as defined in Section 5.2.2 hereof) or access to, or configuration of, Tenant's truck loading or trash removal facilities, then Tenant shall have the right to terminate this Lease.

(b) In the event (A) this Lease has terminated pursuant to Section 3.1(a) above, and (B) Landlord or any Affiliate of Landlord actually commences to construct the Southwest Quadrant on or before the date which is three (3) years after the effective date of the termination of this Lease pursuant to Section 3.1(a) above, then Landlord shall be obligated to offer to Tenant, at the time of the commencement of the construction, the option to lease a portion of the Southwest Quadrant substantially equivalent in size to the Premises upon all the terms and conditions of this Lease (including, without limitation, the amount of Fixed Rent which is not greater than [but which may be less than] the Fixed Rent set forth herein); provided, however, that all dates set forth in the Lease shall be extended. In the event Tenant elects, within thirty (30) days after such offer, to exercise such option, Landlord and Tenant shall promptly execute a lease upon substantially the same terms and provisions of this Lease. In the event Tenant does not elect, within thirty (30) days after such offer, to exercise such option, Landlord shall be free to lease such premises to any other person or entity and on any terms agreed to

between Landlord and another tenant. The provisions of this Section 3.1(b) shall survive the expiration or earlier termination of this Lease.

Section 3.2 Plan Approvals. Within ninety (90) days after the Effective Date. Landlord shall deliver to Tenant the "Civil/Site Drawings" (hereinafter defined). As used herein, the term "Civil/Site Drawings" shall include all of the following drawings, with appropriate details, for the parcel of land on which the Premises shall be constructed: (i) site plan; (ii) grading, drainage, and erosion control plan; (iii) utility plan; (iv) landscaping and irrigation plan, (v) photometric plan, and (vi) geotechnical report. The Civil/Site Drawings shall be consistent with the provisions of Exhibits B and D attached hereto. Tenant acknowledges that Landlord may require certain information from Tenant in connection with its seeking the Required Land Use Approvals and/or in connection with the preparation of the Civil/Site Drawings and Tenant agrees to reasonably cooperate with Landlord's requests with respect thereto, including without limitation, providing a preliminary layout of the Premises. Within fifteen (15) business days after its receipt of the Civil/Site Drawings, Tenant shall notify Landlord of Tenant's approval thereof or the reasons why such approval cannot be granted. If Tenant fails to respond within such fifteen (15) business day period, Landlord shall give Tenant a five (5) business day written reminder notice expressly stating that Tenant's consent to the Civil/Site Drawings shall be deemed to have been given unless Tenant responds within five (5) business days after receipt of Landlord's reminder notice, failing which Tenant's consent shall be deemed given. In the event that Landlord's submittal of the Civil/Site Drawings is not approved by Tenant, then Landlord shall revise the Civil/Site Drawings to address all of Tenant's comments and re-submit them to Tenant for Tenant's review and approval. The re-submittal described in the preceding sentence shall be delivered to Tenant by Landlord within fifteen (15) days of receipt of Tenant's notice that the previous submittal has not been approved. The process described above shall be repeated until Landlord has secured Tenant's approval of the Civil/Site Drawings. Within ninety (90) days after the later of (a) written notice to Tenant that the Land Use Approval Contingency Date has occurred and (b) Tenant's receipt and approval (or deemed approval) of the Civil/Site Drawings, Tenant shall deliver to Landlord Tenant's plans ("Tenant's Plans") depicting Tenant's Work. Landlord shall have twenty (20) days from its receipt of Tenant's Plans to approve or disapprove Tenant's Work depicted thereon, which plans and work shall be approved so long as they: (x) comply with all Legal Requirements, and (y) are substantially consistent with Exhibits B, D, D-1, and F attached hereto, it being agreed that Landlord shall have no approval rights with respect to Tenant's Plans unless Tenant's Plans fail to comply with the requirements of clauses (x) and (y). If Landlord shall fail to disapprove Tenant's Plans (to the extent that Landlord has an approval right pursuant to the immediately preceding sentence) with reasonable specificity within said 20-day period, Tenant shall give Landlord a five (5) business day written reminder notice expressly stating that Landlord's consent to Tenant's Plans shall be deemed to have been given unless Landlord responds within five (5) business days after receipt of Tenant's reminder notice, failing which Landlord's consent to Tenant's Plans shall be deemed given. In the event that Tenant's submittal of Tenant's Plans is not approved by Landlord (if such approval right is applicable), then Tenant shall revise Tenant's Plans to address Landlord's comments and re-submit them to Landlord for Landlord's review and approval. The re-submittal described in the preceding sentence shall be delivered to Landlord by Tenant within fifteen (15) days of receipt of Landlord's notice that the previous submittal has not been approved. The process described above shall be repeated until Tenant has secured Landlord's approval of Tenant's Plans.

3.2.1 Plan Changes.

(a) After Tenant approves the Civil/Site Drawings, Tenant shall have the right to require Landlord to subsequently make changes thereto (the "Changes"), provided that such Changes do not require approval by any governmental authority. Within ten (10) business days after receiving Tenant's request for any Change, Landlord shall give Tenant notice of the cost or savings, and any delay, that may be occasioned by such Change, which notice shall be accompanied by all back-up supporting the cost increases or delays. If Tenant fails to authorize such Change within five (5) business days after receiving Landlord's notice, Tenant shall be deemed to have disapproved such Change.

(b) Tenant shall pay to Landlord the net reasonable additional third-party costs of Landlord's Work resulting directly and solely from the aggregate Changes (exclusive of any charges for overhead and profit, other than sums not exceeding 7% subcontractor profit and 7% general contractor profit thereon), taking into consideration any and

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- 1 all actual costs and savings resulting from all Changes, in the aggregate (including, without
- 2 limitation, reasonable costs approved by Tenant in advance associated with any acceleration of
- 3 the work schedule which Tenant, at its sole option, may require). Such payment shall be due and
- 4 payable within thirty (30) days after Tenant's receipt of backup information reasonably
- 5 supporting all such costs, including, without limitation, invoices, but in no event earlier than the
 - Delivery Date.

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(c) [Intentionally Deleted].

8 (d) If, despite Landlord's diligent efforts in performing Landlord's 9 Work, the Changes cause a net delay in the Substantial Completion of Landlord's Work (taking 10 into consideration any time reductions resulting from such Changes), then: (i) the Rent 11 Commencement Date shall be determined as if such delay had not occurred; (ii) the dates set 12 forth in clauses (a) and (b) of Section 3.3.2 below shall be extended by the number of days of 13 such net delay; and (iii) with respect to Changes requested after the Delivery Date Notice is 14 given, for purposes of calculating liquidated damages under Subsection 2.3.2(b) above, the 15 Delivery Date shall be extended by the number of days of such net delay.

Section 3.3 Performance of Work.

3.3.1 Both Landlord's Work and Tenant's Work shall be performed in a good and workmanlike manner, in compliance with all applicable Legal Requirements, utilizing only new, first-class materials. Landlord shall pay any and all impact fees and related governmental charges in connection with bringing utility lines to the Pad except Tenant shall be responsible for deposits and similar hook-up fees for connecting Tenant's utilities to the lines provided by Landlord and establishing accounts with the local utility company. Within ninety (90) days after the Effective Date, Landlord shall deliver to Tenant the written consent from Dick's and any other applicable party having consent or approval rights to permit Tenant to have the staging areas for Tenant's Work as designated as "Tenant's Staging" on Exhibit B. If Landlord shall be unable to deliver such consent within such 90-day period, Tenant shall have the right, but not the obligation, to obtain Dick's consent for a period of thirty (30) days and if Tenant is unable to obtain such consent (or elects not to obtain same) within such 30-day period, Tenant shall have the right, by notice to Landlord given not later than the tenth (10th) day after the expiration of such 30-day period, to terminate this Lease or if not so terminated, the condition for Landlord to obtain such consent shall be deemed waived. If Tenant terminates this Lease as aforesaid, then neither party shall have any further liability hereunder except for those provisions that expressly survive the expiration or earlier termination of this Lease, including, without limitation, Landlord's reimbursement of Tenant-produced plans to the extent required pursuant to Section 3.1 above.

3.3.2 If: (a) Landlord's Work has not been commenced within thirty (30) days after the later to occur of (i) the Land Use Approval Contingency Date, (ii) the date on which Landlord obtains building permits for Landlord's Work, and (iii) the Permit Contingency Date (provided Tenant shall have given Landlord written notice of such date) (the later of clause (i), (ii) and (iii) herein referred to as the "Pad Commencement Date"), or (b) the Delivery Date shall not have occurred within one hundred twenty (120) days after the Pad Commencement Date (subject to Force Majeure, not to exceed sixty (60) days in the aggregate, and provided that Landlord shall have given Tenant notice of such event of Force Majeure promptly after its occurrence), Tenant may thereafter, during such time as Landlord's Work has not been commenced or the Delivery Date has not occurred, as the case may be, consider Landlord to be in default hereunder and, at Tenant's option in its sole discretion, elect to:

terminate this Lease, if Landlord shall fail to fully cure such default within thirty (30) days after receiving Tenant's notice thereof, in which event neither party shall have any further liability hereunder, except: (y) for those obligations which survive the expiration or other termination of this Lease pursuant to the express terms of this Lease, and (z) Landlord shall be obligated to promptly reimburse Tenant, as Tenant's sole monetary remedy by reason thereof, for all its reasonable third-party costs and expenses incurred in connection with this Lease (including, without limitation, costs associated with the preparation and review of plans and specifications, attorney's fees, and the performance of Tenant's Work), not to exceed Fifty Thousand Dollars (\$50,000; and/or

avail itself of the remedies set forth in Section 16.2 below 1 2 (provided, however, that the cure period set forth therein shall not be applicable); and/or 3 extend one or more times the dates set forth in clauses (a) 4 and/or (b) of this Subsection 3.3.2 to such future dates designated by Tenant in notice given to 5 Landlord, and as to any extension granted with respect to the clause 3.3.2(b) above, in addition to any other rights and remedies to which Tenant may be entitled, the Rent Commencement Date 7 shall be postponed by two (2) days for each day of the extension granted as to clause 3.3.2(b) 8 9 The election by Tenant of any one or more of the foregoing remedies shall not preclude the 10 subsequent election of any alternative remedy provided in this Section, this Lease, at law, or in equity. If Tenant fails to complete construction of the Premises within eighteen (18) months from 11 12 the Delivery Date and such failure is due solely by reason of Tenant's intentional and/or willful 13 acts or omission, then Landlord shall have the right to terminate this Lease upon thirty (30) days' 14 notice to Tenant but Tenant shall have the right to nullify Landlord's termination right by 15 completing such construction within such thirty (30) day period. 16 3.3.3 Landlord's Work Performed After Delivery of Possession. On or before 17 the Delivery Date, Landlord's and Tenant's representatives together shall conduct a walk-18 through of the Pad to compile a punch list of the "Punch List Items" (hereinafter defined). 19 Tenant shall deliver to Landlord a copy of said punch list within five (5) days after the walkthrough. Landlord shall complete any Punch List Items within ten (10) days after it receives a 20 21 copy of said punch list. If Landlord fails to complete any item on said punch list within said 10-22 day period, Tenant shall have the right to complete such item(s) using its own contractors and 23 receive reimbursement from Landlord for the reasonable costs and expenses thereof within thirty 24 (30) days of demand. As used herein, the term "Punch List Items" shall mean such minor items 25 which, when considered as a whole, do not adversely affect either the performance of Tenant's 26 Work or Tenant's ability to conduct its normal business operations in the Premises. 27 3.3.4 Tenant's Right of Entry. Prior to the Delivery Date, Tenant may enter 28 upon the Pad for the purposes of inspecting the work, taking measurements and making plans, 29 without being deemed thereby to have taken possession or obligated itself to pay Rent, provided, however, that Tenant shall not, during the course of such work, materially interfere with the 30 performance of Landlord's Work and shall indemnify and hold Landlord harmless from and 31 against any and all claims or losses arising from Tenant's entry upon the Premises, except to the 32 33 extent caused by Landlord, its agents, employees, or contractors. 34 3.3.5 Work Requirements After Delivery Date. Following the Delivery Date, 35 any construction by Landlord (including the Quadrant Development Work) or by other tenants or 36 occupants of the Shopping Center (to the extent that Landlord has the right to enforce the 37 provisions of this Section 3.3.5 in Existing Leases) affecting any portion of the area designated as "Critical Area" on Exhibit B hereto (the "Critical Area"), shall be subject to the following 38 39 terms and conditions: staging and storage of materials and parking of construction 40 vehicles shall occur only within those areas designated as "Landlord Staging" in Exhibit D; 41 42 from and after Tenant's opening for business to the public, 43 Landlord shall use commercially reasonable efforts to cause any construction, delivery and related vehicles engaged in the performance of such work or other construction activities to not 44 materially interfere with Tenant's business operations; and 45 Landlord shall maintain the Shopping Center in a clean, safe, and 46 47 sightly condition, and shall use reasonable efforts to ensure that such construction shall not materially adversely interfere with the normal conduct of any business operations in the 48 Premises. 49 50 Section 3.4 Tenant's Leasehold Improvements. Subject to Section 3.6 below, Tenant's Work and all other improvements erected by Tenant with respect to the Premises, 51

together with any replacements thereof, shall be and remain the property of Tenant throughout

the Term, and Tenant alone shall be entitled to the benefits of ownership thereof, including, but

not limited to, depreciation of same as an asset for tax purposes.

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Section 3.5 Tenant's Trailer. Tenant shall have the right, subject to applicable 1 2 Legal Requirements, to place a trailer in an area immediately adjacent to the Premises, in the 3 location shown on Exhibit B hereto, during the period commencing on the forty-fifth (45th) day 4 prior to date on which Tenant has scheduled for the commencement of its fixturing in the 5 Premises, until the twentieth (20th) day after said fixturing date (but not later than the date Tenant 6 opens for business in the Premises), for the purpose of conducting employee interviews and 7 recruiting. Tenant shall be responsible, at its sole cost and expense, for making arrangements for 8 any required utilities to the trailer, as well as paying for any such utilities consumed. 9 Section 3.6 Tenant Allowance. Landlord shall pay Tenant the liquidated sum 10 of One Hundred Twenty Five Dollars (\$125.00) per square foot of Floor Area of the Premises 11

of One Hundred Twenty Five Dollars (\$125.00) per square foot of Floor Area of the Premises (the "*Tenant Allowance*") in consideration for Tenant's construction of "Landlord's Special Improvements" (defined below). Landlord and Tenant hereby acknowledge and agree that the Tenant Allowance shall be in addition to Landlord's Work. Landlord shall pay the Tenant Allowance to Tenant within thirty (30) days after Tenant requests such payment after the satisfaction of all of the following:

16 (i) Substantial Completion of Tenant's Work in accordance 17 with the Tenant's Plans, as certified by Tenant's architect,

(ii) Landlord's receipt of a lien waiver from Tenant's general contractor and lien waivers from subcontractors and materialmen performing Tenant's Work; provided that (x) no waivers shall be required for amounts less than \$25,000, and (y) Landlord will pay the portion of the Tenant Allowance for which lien waivers are provided (notwithstanding that some lien waivers may not be forthcoming due to disputes, etc.) or (z) in lieu of such lien waivers from subcontractors and materialmen, an agreement executed by Tenant regarding mechanics' and materialman's liens in the form attached hereto as Exhibit M;

(iii) Landlord's receipt of a copy of a fully executed standard form of contractor's requisition indicating substantial completion of Tenant's Work and completed AIA forms 702 and 703 (with schedule of values) (or substantially similar documents); and

(iv) Landlord's receipt of a temporary or permanent certificate of occupancy (or its local equivalent), unless such certificate is not available for any reason other than Tenant's failure to perform Tenant's Work in compliance with all Legal Requirements.

Tenant acknowledges that the Tenant Allowance shall be used for leasehold improvements to the Premises and that no portion of the Tenant Allowance shall be used to pay for any of Tenant's furniture, trade fixtures, equipment or inventory. If Landlord fails to provide Tenant with the Tenant Allowance within thirty (30) days of Landlord's receipt of the applicable documentation or occurrence of all of the events set forth above and such failure continues for five (5) business days after Landlord's receipt of a second notice notifying Landlord of such failure, then in addition to the rights and remedies under Section 16.2 of this Lease, Tenant shall have the right to deduct from Rent any unpaid portion of the Tenant Allowance, together with interest thereon at the Lease Interest Rate. The Tenant Allowance is an offset (and not an inducement) for Tenant's construction, on behalf of Landlord, of Tenant's Work (the "Landlord's Special Improvements") (which Landlord's Special Improvements, together with any replacements thereof, when completed shall be the property of Landlord, subject to use by Tenant of same during the Term of, and in accordance with, this Lease). Landlord alone shall be entitled to depreciate the Landlord's Special Improvements as an asset for tax purposes, and Tenant shall not recognize income with respect to the Tenant Allowance. Tenant shall be responsible for and herewith agrees to pay all costs of Tenant's Work in excess of the Tenant's Allowance, and Tenant's Work (except for Landlord's Special Improvements), together with any replacements thereof, shall be and remain the property of Tenant throughout the Term, and Tenant alone shall be entitled to the benefits of ownership thereof, including, without limitation, depreciation of same as an asset for tax purposes. Upon expiration or sooner termination of this Lease, all improvements and additions to the Premises (other than Tenant's Personal Property) shall be deemed the property of the Landlord, and all other alterations, decorations, additions, equipment and improvements made by Tenant to the Premises, shall be deemed attached to the fee interest in the property and shall be Landlord's property and Tenant shall have no right to alter or remove said improvements. Within sixty (60) days after the later of (i) Tenant's receipt of written notice from Landlord requesting same and (ii) Tenant opening for business in the

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- Premises, Tenant shall deliver to Landlord final "as-built" plans for the improvements
- 2 constructed by Tenant (as well as copies of all warranties obtained by Tenant in connection with
- 3 Tenant's Work to the extent such warranties cover repairs to the Premises for which Landlord is
 - responsible hereunder), operating manuals and paid invoices for Tenant's Work.

Section 3.7 Measurement; Adjustment of Rent.

3.7.1 <u>Measurement of Premises and Shopping Center</u>. Tenant shall deliver to Landlord a certification by Tenant's licensed architect, surveyor or engineer of the Floor Area (with the dimensions on which it is based) of the Premises, the measurements of which shall be subject to confirmation by Landlord's licensed architect, surveyor or engineer. If Tenant shall fail so to deliver such certification to Landlord, Landlord shall have the right to have any of such measurements made and certified to Tenant by Landlord's licensed architect, surveyor or engineer.

3.7.2 Adjustment of Fixed Rent. If the measurement of the Premises shall indicate a Floor Area more or less than the Floor Area of the Premises set forth in Section 1.1.26, the Fixed Rent and any other applicable provision of this Lease (including, without limitation, the Tenant Allowance) shall be adjusted to conform to the actual measurement, and Tenant shall receive a proportional refund of any Rent overpaid to Landlord or shall pay any deficiency in Rent as a result thereof, provided that in no event shall the final measurement be deemed to be less than 21,000 square feet of Floor Area unless Landlord delivers to Tenant a Pad that shall not accommodate a building having the dimensions indicated on Exhibit B. Landlord and Tenant shall each promptly execute and deliver to the other an amendment memorializing any change to the Fixed Rent or any other applicable provisions of this Lease, made pursuant to this Section 3.7. Any dispute between the parties with respect to the Floor Area of the Premises shall be resolved by arbitration in accordance with the provisions of Section 16.3 below."

ARTICLE 4 FIXED RENT, PERCENTAGE RENT AND TAXES: DETERMINATION AND PAYMENT

Section 4.1 <u>Fixed Rent</u>. Commencing on the Rent Commencement Date and continuing throughout the Term, Tenant shall pay to Landlord the Fixed Rent, in equal successive monthly installments, in advance, on the first day of each and every calendar month throughout the Term, except that Fixed Rent payable for any partial calendar month during the Term shall be prorated based on a 365-day year. Fixed Rent shall be paid without deduction or set-off, except to the extent otherwise expressly provided herein.

Payment of Rent. All Rent shall be mailed or otherwise delivered Section 4.2 to Landlord at Landlord's Mailing Address as specified in Section 1.1.18 or, upon at least thirty (30) days' prior notice to Tenant, to such other address as Landlord may from time to time designate. Landlord acknowledges and agrees that for administrative purposes, Tenant may designate a corporation or other entity to act as a paying agent (the "Paying Agent") to make all Rent payments due to Landlord under this Lease. Said designation (which may be revoked by Tenant at any time) is not intended as, and shall not constitute, an assignment of any rights or obligations of Tenant to the Paying Agent, and Tenant shall remain primarily liable for payment of Rent under this Lease. All payments of Rent received by Landlord from the Paying Agent shall be credited to Tenant as if such payments of Rent had been made by Tenant directly to Landlord. If any payment of Rent is not paid when due under this Lease, then, in addition to the payment then due, Tenant shall pay Landlord, as Additional Rent, a late charge ("Late Rent Charge"), which shall be the greater of (i) One Hundred and 00/100 Dollars (\$100.00), or (ii) five percent (5%) of the amount then due but no such Late Rent Charge shall be payable for the first two (2) delinquencies in which Rent is not paid when due during any 12 month period. Any payment of Rent which is not paid after notice thereof is given pursuant to Section 16.1.1 shall also bear interest on the payable amount from the date when due until paid at the Lease Interest

Section 4.3 Real Estate and Other Taxes.

4.3.1 Landlord shall pay on or before the due dates thereof all "Taxes" (defined in Subsection 4.3.3 below) other than personal property taxes levied against tenants. Throughout the Term, Landlord shall cause the Shopping Center to be maintained entirely within tax parcels and lots that exclude any property not a part of the Shopping Center.

4.3.2 As used herein, "*Taxes*" shall mean all general real estate taxes, and assessments for betterments and improvements that are levied or assessed by any lawful authority on the Shopping Center (general or special), including any substitution therefor, in whole or in part, due to a future change in the method of taxation. Landlord acknowledges and agrees that Tenant shall not be responsible for any payment to Landlord of any Taxes in connection with the Shopping Center and/or the Premises, which payments are deemed to be included in Common Area Charges.

Section 4.4 Percentage Rent.

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4.4.1 Payment. During and for each full calendar year during the Term, Tenant shall pay annual percentage rent ("Percentage Rent") as follows: (i) an amount equal to three percent (3%) of all "Gross Sales" (hereinafter defined in Subsection 4.4.2) resulting from business conducted in, on or from the Premises during such calendar year in excess Twelve Million Dollars (\$12,000,000) up to Fifteen Million Dollars (\$15,000,000). No Percentage Rent shall be payable on Gross Sales that exceed \$15,000,000. The aforesaid amount of \$12,000,000 and \$15,000,000 are herein referred to as "Breakpoints" and such Breakpoints shall each increase at the same time and by the same percentage as Fixed Rent increases under this Lease. Within sixty (60) days after the close of each calendar year, Tenant shall furnish to Landlord a compilation prepared by an officer of Tenant setting forth the amount of Gross Sales during the preceding calendar year and showing the amount of Percentage Rent, if any, required to be paid by Tenant for such calendar year; provided, however, that Tenant shall not be required to provide such compilation if the amount of Gross Sales for such calendar year is less than ninety percent (90%) of the Breakpoint applicable for such year. The full amount of any Percentage Rent due shall be paid to Landlord simultaneously with the furnishing of said compilation. Notwithstanding the foregoing, no Percentage Rent shall be payable with respect to the period commencing on the Rent Commencement Date and ending on the December 31 next following the Rent Commencement Date.

4.4.2 Definition of Gross Sales. As used herein, the term "Gross Sales" shall mean the total amount of all sales of merchandise or services fulfilled from the Premises by Tenant or any sublessee, licensee or concessionaire of Tenant (subject, however, to Section 4.4.6) and any other person or entity operating in the Premises (for purposes of this Subsection 4.4.2 only, collectively, "Tenant"), whether for cash, credit or otherwise, including redemption of gift certificates and gift cards. Tenant shall record, at the time of each Gross Sale, all receipts from such sale, whether for cash, credit or otherwise, in a cash register or cash registers, or in such electronic or computer device which records sales in a manner which is generally acceptable by industry standards. The term "Gross Sales" shall exclude: (1) proceeds from any sales tax, gross receipts tax or similar tax, by whatever name called, which are separately stated and are in addition to the sales price, (2) bona fide transfers or exchanges of merchandise from the Premises to any other stores or warehouses of Tenant or any Affiliates of Tenant, and returns to shippers and manufacturers for credit, (3) refunds or credits given to customers for merchandise returned or exchanged at the Premises (but only to the extent the original sale was included in Gross Sales hereunder), (4) sales of Tenant's fixtures and equipment not in the ordinary course of Tenant's business, (5) to the extent of prior inclusion in Gross Sales, bad debts when written off the books of Tenant, provided that any collections made on account of such bad debts shall be included in Gross Sales when received, (6) receipts from vending machines installed solely for the use of Tenant's employees and receipts from pay telephones, (7) sales to employees of Tenant at discount (which, for the purposes of determining Percentage Rent hereunder, shall not exceed two percent (2%) of Gross Sales per calendar year or pro rata portion thereof, as applicable), (8) fees paid to independent third party credit card, charge card, debit card, and check verification/guaranty companies in connection with sales charged to or debited from customers' credit cards, charge cards, or debit cards, or sales paid for by customers by checks, as applicable, (9) proceeds from delivery, gift-wrapping and check cashing charges (which, for the purposes of determining Percentage Rent hereunder, shall not exceed two percent (2%) of Gross Sales per calendar year or pro rata portion thereof, as applicable), (10) sums and credits received in settlement of claims for loss or damage to merchandise, (11) separately stated service, finance and interest charges, (12) the dollar value of coupons utilized by customers in the purchase of merchandise from the Premises, (13) close-out or bulk sales of inventory to jobbers or wholesalers, and (14) sales of gift certificates and/or gift cards (until redeemed).

4.4.3 <u>Books and Records</u>. Tenant shall maintain at the Premises or at its principal office, complete books and records reflecting all elements of Gross Sales. Tenant shall

- be allowed to maintain its books and records in a computerized form; <u>provided</u>, <u>however</u>, that (i)
- 2 such computerized books and records provide the same level of information as the books and
- 3 records described above, are retained for the full record retention period provided for herein, and
- 4 (ii) promptly upon request, printed copies of any such books and records are made available at
- 5 Tenant's principal office for inspection by Landlord's representatives who are engaged in
- 6 inspecting and/or auditing Tenant's books and records as provided herein. Such books and
- 7 records shall be kept in accordance with generally accepted accounting principles (or successor
 - accounting standards) and practices consistently applied and shall be retained by Tenant for at
- 9 least three (3) years following the end of the calendar year to which they refer.
- 4.4.4 <u>Landlord's Right to Audit.</u> Landlord and/or Landlord's auditor shall have
- the right, upon at least thirty (30) days prior notice to Tenant (but not more than once per
- annum), to inspect and/or audit the records of Tenant relating to Gross Sales. If any such audit
- discloses a deficiency in the Gross Sales reported by Tenant, Tenant shall pay any deficiency in
- Percentage Rent owing to Landlord on account of such deficiency, together with interest thereon
- at the Lease Interest Rate. If such deficiency is in excess of three (3%) percent of the Gross
- 16 Sales reported by Tenant and Percentage Rent is then payable, Tenant shall also pay Landlord's
- 17 reasonable costs of the inspection and audit. Tenant has not and does not make any
- 18 representation or warranty as to the amount of Gross Sales which are anticipated from the
- 19 Premises.

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- 20 4.4.5 <u>Confidentiality</u>. Landlord shall not disclose to any third party Tenant's
- Gross Sales or the amount of Percentage Rent paid or payable by Tenant, provided, however,
- 22 that (i) such information was not previously disclosed by Tenant to such third party or to the
- 23 public generally, and (ii) nothing contained herein shall restrict Landlord from disclosing such
- 24 information as may be required by applicable Legal Requirements or to its accountants,
- 25 attorneys, bona fide prospective purchasers, or current or prospective Mortgagees or underlying
- 26 lessors of all or any portion of Landlord's interest in the Shopping Center (provided that each of
- such recipients shall be bound to the same non-disclosure provisions as are imposed upon
- 28 Landlord).

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- 4.4.6 Any dispute between the parties relative to the provisions of this Section 4.4, including, without limitation, the amount of Percentage Rent payable by Tenant, shall be
- 31 submitted to arbitration in accordance with the provisions of Section 16.3 of this Lease

32 ARTICLE 5 33 COMMON AREAS, THEIR USE AND CHARGES

Section 5.1 Common Areas: Maintenance.

- 5.1.1 Maintenance of Common Areas. Landlord shall operate, maintain, repair and replace the Common Areas as required by this Lease and otherwise to the standard by which Common Areas of first-class shopping centers in the state in which the Shopping Center is located are operated, maintained, repaired and replaced, including, without limitation, snow, ice, rubbish and debris removal (including installation and maintenance of sidewalk refuse containers), landscaping (including, without limitation, the trimming and pruning of trees to avoid interference with the use or visibility of canopies or signs on the exterior of the Premises), adequate lighting, insurance, supervision, parking lot paving and striping, drainage, security (as reasonably required), and control of all Common Areas, and Landlord shall comply with all
- 44 applicable Legal Requirements.
- 45 5.1.2 Tenant's Fixed Share of CAM. During the Term, Tenant shall pay to
- 46 Landlord a fixed share ("Fixed Share") of the costs (hereinafter referred to as the "Common
- 47 Areas Charges") paid by Landlord to operate, maintain, insure and repair the Common Areas,
- 48 which shall include the premiums for insurance required to be maintained by Landlord under
- 49 Section 10.3 below and Taxes for the Shopping Center. Tenant's Fixed Share of such Common
- Areas Charges from the Rent Commencement Date through the end of the first full calendar year
- of the Term (i.e. the period from the Rent Commencement Date through the December 31st after
- 52 the first anniversary of the Rent Commencement Date) shall equal Six and 00/100 Dollars
- 53 (\$6.00) per square foot of Floor Area in the Premises (the "First Year Cap"). Thereafter,
- Tenant's Fixed Share shall increase by three percent (3%) in each subsequent calendar year (the
- 55 "Fixed Increases"). Tenant's Fixed Share shall be paid in equal monthly installments on the
- 56 first day of each calendar month, in advance, during each calendar year. Notwithstanding the

- foregoing, if the period from the Rent Commencement Date through the end of the calendar year
- 2 in which the Rent Commencement Date occurs is greater than 180 days (the "Partial Year"),
- 3 then the First Year Cap shall pertain only to such Partial Year and not to the period from the
- 4 Rent Commencement Date through the December 31st after the first anniversary of the Rent
- 5 Commencement Date, provided that the foregoing shall not affect the Fixed Increases.
 - 5.1.3 In no event shall Tenant be required to join, participate in or contribute to any promotional fund, marketing fund or merchants' association.

Section 5.2 <u>Common Areas: Restrictions.</u>

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5.2.1 <u>Continuous Access.</u> No entrances, exits, approaches and means of ingress and egress to, from, and/or within the Shopping Center or the Premises as designated on <u>Exhibit B</u> hereto as "*Critical Access Way*" shall be interrupted or disturbed by any act or omission of Landlord during the Term, except: (i) in the event of an emergency, to make repairs which Landlord is obligated to perform pursuant to the terms of any lease at the Shopping Center or as may be otherwise required by other leases in the Shopping Center or applicable Legal Requirements, in which event Landlord shall use reasonable efforts to give Tenant advance notice of same and to minimize interference to Tenant's normal business operations in the Premises as a result thereof; or (ii) in the event that Landlord is required to temporarily close the Common Areas, for the minimum time legally necessary to prevent a dedication thereof or an accrual of any rights in any person or the public generally therein; <u>provided</u> that such closure shall not occur during August (through Labor Day), November or December of any calendar year, and Landlord shall give Tenant at least thirty (30) days' prior notice thereof.

5.2.2 No Alterations. Landlord has advised Tenant that Landlord is redeveloping the Southwest Quadrant (hereinafter defined) of the Shopping Center, which redevelopment includes (I) adding Retail A, A-2, B and C as shown on Exhibit B; (II) constructing a new 2 story building between Target and the Shopping Center's Food Court in approximately the area indicated on Exhibit B, which Landlord currently contemplates housing Dave & Busters and a not yet determined junior anchor tenant; (III) performing certain site/civil and utility trenching work in connection with (I) and (II) above; and (IV) modifying the parking configuration in the Southwest Quadrant as shown on Exhibit B (items I – IV above the "Quadrant Development Work"). Notwithstanding the foregoing, Landlord covenants that none of the Quadrant Development Work shall, from and after the date Tenant opens for business in the Premises, be performed so as to adversely affect that portion of the Critical Area (as defined below) bounded by the most westerly wall of Retail B and the most easterly wall of Retail C (as shown on Exhibit B) and extending north to the end of the Critical Area. Notwithstanding the foregoing, Landlord shall have the right to perform utility trenching and other site work in the Critical Area provided such work is performed only after the Premises is closed for business and the area affected by such work is restored and operational by the time Tenant opens for business the next day. Landlord shall erect customary screening or construction barricades around the areas affected by the Quadrant Development Work to safeguard pedestrians. Except as may be required to comply with Legal Requirements or to perform repairs and subject to certain changes to the extent permitted or agreed to by Tenant pursuant to the last sentence of Section 3.1(a), Landlord shall not, without obtaining Tenant's prior written consent in each instance, which consent may be withheld in its reasonable discretion (except as otherwise indicated below): (i) alter the location, availability or size of any Common Area improvement located within the Critical Area from that shown on Exhibit B hereto; (ii) construct or permit to be constructed any structures in the Critical Area of the Shopping Center (including, without limitation, any buildings, kiosks, booths, signs or similar structures in the Critical Area) or construct any buildings or other structures in the Southwest Quadrant, other than as shown on Exhibit B hereto; or (iii) materially change the entrances or exits to and from the Southwest Quadrant designated "Critical Access Ways" on Exhibit B; (iv) materially alter the curb cuts, roadways, drive aisles, sidewalks or other elements of the Common Areas in the Southwest Quadrant, or (v) alter the number, location or layout of parking spaces located within the Critical Area from those shown on Exhibit B hereto; it being agreed, however, that Tenant withhold its consent in its sole discretion without any reasonableness standard with respect to (i) any reduction in the number of parking spaces in the Critical Area; (ii) the construction of any new building in the Critical Area and/or (iii) any alteration to the Critical Area that would adversely affect pedestrian and/or truck access to the Premises or Tenant's loading dock areas or adversely impact the visibility of the Premises and Tenant's exterior signs. If Tenant is then operating its business in the Premises,

Landlord shall neither perform nor permit to be performed, any construction, repairs,

- replacements or maintenance to any portion of the Southwest Quadrant including the Premises (other than emergency repairs to utilities and Common Areas) during the months of August (through Labor Day), November and December of any year, without the prior consent of Tenant, which consent may be withheld in Tenant's sole discretion. Tenant agrees that (x) all of the restrictions set forth in this Section 5.2.2 only apply to the Southwest Quadrant and (y) except as expressly provided in this Lease, Landlord shall have the right to make whatever changes,
- removals, additions, reconfigurations and/or alterations as Landlord desires in and to the Shopping Center provided none of the foregoing adversely affects the accessibility to, or the
- 9 visibility of, the Premises, Tenant's signage and loading and trash removal facilities.

5.2.3 [Intentionally Deleted].

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Parking Area. During the Term, Landlord shall maintain in the Shopping Center, at a minimum, the greater of (i) the number of parking spaces required by applicable Legal Requirements, without variance, or (ii) four (4.0) parking spaces for every one thousand (1,000) square feet of Floor Area in the Shopping Center (the "Minimum Parking Requirement"), provided that all of the parking in the Southwest Quadrant shall be surface parking as opposed to multi-tiered parking decks. All parking spaces in the Critical Area shall be at least nine (9) feet in width and eighteen (18) feet in length. Parking spaces shall at all times be clearly marked by painting, striping or otherwise. Tenant and its employees, agents, subtenants, concessionaires, licensees, customers, and invitees ("Permitted Users") shall have the exclusive right to use six (6) parking spaces in the area located in front of the Premises and identified as the "Expectant Mother Parking Area" on Exhibit B hereto ("Expectant Mother Parking Spaces"). Landlord shall have no obligation to enforce the use of the Expectant Mother Parking Spaces. Without limiting the foregoing, Tenant and its Permitted Users shall have unrestricted access to the Expectant Mother Parking Spaces for the exclusive use of expectant mothers and/or parents with infants who are customers of Baby. The Expectant Mother Parking Spaces shall be prominently marked and/or signed as reserved for customers and invitees of Tenant and as otherwise may be required by Exhibit F. Landlord may designate specific parking spaces for use by other tenants or occupants of the Shopping Center (including granting Dave & Busters the right to have valet parking) provided each tenant's designated spaces (including such valet parking area) shall not be in the Critical Area (other than the Customer Pick Up Area for the benefit of Cost Plus World Market). Landlord shall not permit any person or entity to use the parking areas other than Tenant, the other tenants and occupants of the Shopping Center, and their respective Permitted Users. Landlord shall have the right to impose parking fees for the Shopping Center provided Tenant's employees shall not be required to pay any fee and further provided that Tenant's customers shall be permitted to validate any such parking fees, all tenants of the Shopping Center are likewise required to participate in such program and no tenant of the Shopping Center is given greater rights or preferential treatment than what is imposed upon or offered to Tenant. Landlord shall not permit overnight parking in the Shopping Center. Notwithstanding the foregoing, if Landlord receives a written notice from a tenant under an Existing Lease stating that Tenant's Expectant Mother Parking Spaces violates its lease with respect to Tenant's reserved or designated parking, then Landlord shall give Tenant a copy of such letter and, subject to Tenant agreeing to comply with any confidentiality provision in the Existing Lease, the applicable provision of such Existing Lease that is claimed to have been violated. Landlord shall use good faith commercially reasonable efforts to obtain the consent of such tenant to Tenant's Expectant Mother Parking Spaces provided Landlord shall not be required to incur any costs or grant concessions to such tenant. Tenant shall have the right to attempt to obtain the consent from such tenant and Landlord shall reasonably cooperate with Tenant. If neither Landlord nor Tenant shall be able to obtain such consent and no other tenant in the Southwest Quadrant has reserved or designated parking spaces, then Tenant shall remove the signage that designates the Expectant Mother Parking Spaces or make such Expectant Mother Parking Spaces non-exclusive.

5.2.5 <u>Lighting</u>. Throughout the Term, Landlord shall keep the Common Areas fully lighted and open to the customers of the Shopping Center seven (7) days a week from dusk until 11:00 p.m. Monday through Saturday and until 7:00 p.m. on Sunday ("Normal Hours"). Upon request of Tenant, Landlord shall keep the Common Areas lighted for as long after Normal Hours as Tenant shall request, <u>provided</u> Tenant shall pay for a share of the reasonable cost of said requested lighting, which share shall be equal to the product of (x) such cost, and (y) a fraction, the numerator of which shall be the number of square feet of Floor Area within the Premises and the denominator of which shall be the aggregate number of square feet of Floor Area of all premises within the Shopping Center (including the Premises) open later than Normal

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 29 of 64

- Hours (<u>excluding</u>, however, those tenants and occupants who separately control and pay for their own Common Area lighting). In addition to the foregoing, Landlord shall provide for low level security lighting from one (1) hour after the close of business in the Premises until dawn.
- 4 5.2.6 Repairs. During the Term any construction or repair by Landlord permitted or required under this Lease and undertaken in the Critical Area shall:
- 6 (a) except for the Quadrant Development Work, not be performed 7 during the months of August (through Labor Day), November, or December of any year, except 8 in the event of an emergency or as may be otherwise required by applicable Legal Requirements;
- 9 (b) be commenced only upon at least five (5) days' prior notice to 10 Tenant (except in an emergency, in which event Landlord shall only be required to give such 11 notice as is reasonable under the circumstances); and
- 12 (c) be performed in accordance with the requirements of Section 3.3.5 13 above and in such a manner so as not to materially interfere with the normal conduct of any 14 business operations in the Premises.
 - 5.2.7 <u>Rules and Regulations</u>. Tenant shall comply with the rules and regulations of the Shopping Center as established from time to time by Landlord, within thirty (30) days after Landlord notifies Tenant thereof, provided they: (i) are reasonable, (ii) do not adversely affect the normal conduct of any business operations in the Premises, (iii) do not adversely affect any of Tenant's rights under this Lease, and (iv) are uniformly enforced against all tenants of the Shopping Center and without prejudice against Tenant. In the event of any conflict between the provisions of this Lease and any rules or regulations, the provisions of this Lease shall prevail and govern.

5.2.8 <u>Miscellaneous</u>.

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- No Promotional Use. Landlord shall not use or permit the use of all or any portion of the Common Areas in the Southwest Quadrant for retail sales or for promotional purposes provided, however, that tenants of the Shopping Center (including Tenant) shall be permitted to display seasonal merchandise and conduct sidewalk sales in front of their respective stores only ("Sidewalk Sales"), provided that such Sidewalk Sales shall: (A) be conducted in a manner consistent with sidewalk sales in first-class shopping centers in the state in which the Shopping Center is located, (B) not materially interfere with normal pedestrian access over the sidewalks, and (C) not materially interfere with the normal business operations of Tenant in the Premises or materially impair the visibility of Tenant's signage. Notwithstanding the foregoing, if Landlord receives a written notice from a tenant under an Existing Lease stating that Tenant's use of the sidewalk for Sidewalk Sales violates its lease, then Landlord shall give Tenant a copy of such letter and, subject to Tenant agreeing to comply with any confidentiality provision in the Existing Lease, the applicable provision of such Existing Lease that is claimed to have been violated. Landlord shall use good faith commercially reasonable efforts to obtain the consent of such tenant to Tenant's Sidewalk Sales provided Landlord shall not be required to incur any costs or grant concessions to such tenant. Tenant shall have the right to attempt to obtain the consent from such tenant and Landlord shall reasonably cooperate with Tenant. If neither Landlord nor Tenant shall be able to obtain such consent, then Tenant shall not conduct any such Sidewalk Sales. To the extent that Landlord has the legal right to prohibit same, Landlord shall use commercially reasonable efforts to prevent any solicitation, distribution of handbills, picketing, or other public demonstration in the Common Areas, except as otherwise may be mandated by applicable Legal Requirements.
- (b) <u>Trash Compactor and Containers</u>. Tenant shall be permitted to maintain and operate, at no extra charge: (i) a trash compactor in the portion of the Common Areas designated on <u>Exhibit B</u> hereto as "*Trash Compactor Pad*"; and (ii) a trash container(s) in the portion(s) of the Common Areas designated on <u>Exhibit B</u> hereto as "*Trash Container Pad*". Tenant, at its sole cost and expense, shall keep the trash compactor and containers neat and clean and repair any damage caused by use and storage of such compactor and containers.
- 52 (c) <u>Shopping Carts</u>. Tenant, at its sole cost and expense, shall be 53 permitted to store its shopping carts in such exterior cart corrals as may be reflected on <u>Exhibits</u> 54 <u>B</u> and <u>D-1</u> hereto. With respect to shopping carts provided by Tenant for the use of its

- customers, Tenant will use reasonable efforts to retrieve promptly all shopping carts removed from the Premises consistent with the maintenance and operation of a first-class shopping center. Landlord shall not have any responsibility for damage to Tenant's shopping cart corrals or any damage to Tenant's shopping carts, all of which shall be maintained by Tenant at its sole cost and expense. Within ninety (90) days after the Effective Date, Landlord shall deliver to Tenant the written consent from Dick's and any other applicable party having consent or approval rights to permit Tenant to have shopping cart corrals as indicated on Exhibit B. If Landlord shall be unable to deliver such consent within such 90-day period. Tenant shall have the right, but not the obligation, to obtain Dick's consent for a period of thirty (30) days and if Tenant is unable to obtain such consent (or elects not to obtain same) within such 30-day period, Tenant shall have the right, by notice to Landlord given not later than the tenth (10th) day after the expiration of such 30-day period, to terminate this Lease or if not so terminated, the condition for Landlord to obtain Dick's consent shall be deemed waived. If Tenant terminates this Lease as aforesaid, then neither party shall have any further liability hereunder except for those provisions that expressly survive the expiration or earlier termination of this Lease, including, without limitation, Landlord's reimbursement of Tenant-produced plans to the extent required pursuant to Section 3.1 above.
 - (d) <u>Cellular Towers</u>. No transmission and/or reception towers for wireless telephone or internet communications shall be permitted within the Southwest Quadrant except the foregoing shall not prohibit dish or satellite antennas used solely and in an ancillary manner in connection with Tenant's (or other tenant's) business.
 - Requirements and the availability of space, Tenant shall have the right to maintain storage containers or trailers from time to time in locations to be agreed upon by Landlord and Tenant. If and to the extent that Tenant has a container or trailer pursuant to the immediately preceding sentence, Landlord shall have the right, upon reasonable prior notice to Tenant sufficient to permit Tenant time to remove its merchandise from the container or trailer, to temporarily relocate Tenant's containers and/or trailers, at Landlord's sole cost, to an area mutually satisfactory to Landlord and Tenant if such relocation is reasonably required because of an emergency situation or to enable Landlord to make repairs, it being agreed that (i) if no area is available in the Shopping Center in which to relocate Tenant's container or trailer, then Tenant shall agree that it shall not have a trailer or container in the Shopping Center during such emergency or repair period so long as no other tenant has a trailer or container in the Shopping Center during such period; and (ii) Landlord's work shall be done in a diligent and expeditious manner so as to minimize the time period in which Tenant's trailers and/or containers are relocated or are not located in the Shopping Center.

37 ARTICLE 6 38 UTILITIES

Section 6.1 <u>Utility Service</u>. From and after the Delivery Date, and continuing thereafter through the end of the Term, Tenant shall be solely responsible for and shall pay the cost of utilities services (including, without limitation, electricity, gas, water, sanitary sewer, alarm and telecommunications) consumed in the Premises by Tenant. Tenant shall not be obligated to purchase utility service(s) directly from Landlord, or from any utility provider designated by Landlord. Tenant shall provide separate utility meters exclusively serving the Premises, as part of Tenant's Work (including, without limitation, all connection and hook-up fees but excluding impact fees or other related governmental charges). Tenant's entry upon the Premises prior to the Delivery Date shall not constitute a waiver by Tenant of Landlord's obligation to pay the costs of all utility charges incurred in the Premises prior to such date. Landlord shall not permit the capacity of utility lines available for use at the Premises to be reduced or overloaded by any other persons or entities.

Section 6.2 <u>Interruption</u>. Landlord shall not be liable in damages or otherwise for any loss, damage or expense that Tenant may sustain or incur by reason of any change, failure, interference, interruption or defect in the utility services provided to the Premises, provided, that if the utilities serving the Premises are disrupted due to the acts or omissions of Landlord, its agents, contractors, servants or employees, Landlord shall promptly restore the affected utilities at Landlord's sole cost and expense. If the utilities disrupted by Landlord are not restored within twenty-four (24) hours after the Landlord has knowledge of the disruption,

and Tenant is unable to conduct its normal business in the Premises as a result thereof, Rent shall be equitably abated during the period of disruption.

3 ARTICLE 7
4 SIGNS

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Tenant's Building Signage. Subject to compliance with applicable Section 7.1 Legal Requirements, Tenant shall have the exclusive right, as part of Tenant's Work, and thereafter during the Term, at its sole cost and expense, to erect, maintain, and replace on the storefront and exterior walls of the Premises, and on the side walls of any entrance design element, if any, signs (including, without limitation, under-canopy (e.g., blade) signs); banners (including temporary banners placed on the storefront of the Premises and such other walls of the Premises as selected by Tenant), such banners not to exceed a maximum of 60 days per year; awnings; and flags, all of which being of such size, design and color as Tenant, from time to time, may desire provided same are Tenant's or Tenant's subtenant's then prototypical signage and if not such prototypical signage, then Landlord's consent shall not be unreasonably withheld or delayed. Tenant shall also be entitled, at Tenant's sole cost and expense, to install and maintain, during the period commencing on the Effective Date and ending on the day prior to the Rent Commencement Date, a temporary sign or signs in the area designated on Exhibit B which states "Buy Buy Baby Coming Soon" (which signs are more particularly shown in Exhibit F hereto). Tenant may erect and maintain in the interior of the Premises any signs it may desire, provided same are professionally prepared. Notwithstanding the foregoing, Landlord hereby approves Tenant's signage as shown on Exhibits D-1 and/or F (subject to compliance with Legal Requirements).

Pylon/Monument Signage. Landlord shall provide pylons and Section 7.2 monuments at the locations shown on Exhibit B hereto during the entire Term, and obtain all permits and approvals therefor. Tenant shall have the right, at its sole cost and expense, to erect and maintain its identification sign, as shown on Exhibit F hereto (and having colors as shown on Exhibit F hereto). The dimensions and location of Tenant's pylon sign panel(s) shall be as shown on Exhibit F. Landlord shall maintain all pylons and monuments in good order and repair, and allow Tenant access to replace its signs thereon, at Tenant's cost and expense. Tenant shall maintain its sign panels on any pylon or monument in good order and repair at Tenant's sole cost and expense. Subject to changes required by applicable Legal Requirements, Landlord shall not change or alter the location, structure, height or general appearance of the pylons or monuments without obtaining Tenant's prior consent, such consent not to be unreasonably withheld, conditioned or delayed. Landlord shall be responsible for the cost of maintaining all pylons and monuments bearing Tenant's sign panel(s) and the cost of any electricity used to illuminate them Tenant shall have the right to place its sign panel on certain directional signs to be located in the parking areas of the Shopping Center, the number and location of such directional signs to be mutually agreed to by Landlord and Tenant. Tenant's name shall be listed on all Shopping Center directories, websites, maps, pamphlets and similar materials (including directories and maps, if any, located in the Enclosed Mall portion of the Shopping Center).

Section 7.3 <u>Signage: Alteration/Removal/Allocation</u>. Tenant shall have the right, from time to time, without Landlord's approval and at Tenant's sole cost and expense, to change its signs on the storefront and exterior of the Premises, as well as on any pylon or monument, <u>provided</u> that the area of the new sign is no larger than the area of the sign which it replaces, the method of construction and attachment is substantially the same and such sign(s) represent Tenant's or Tenant's subtenant's then prototypical signage and if not Tenant's or such subtenant's then prototypical signage, then Landlord's consent shall not be unreasonably withheld or delayed. Upon the expiration or earlier termination of the Lease, Tenant shall remove its signs from the fascia or other exterior walls of the Premises and from any pylon or monument, and shall repair any damage occasioned thereby. The signage rights granted to Tenant pursuant to this Article 7 shall, at Tenant's option, be allocated to or between Tenant and/or any subtenant(s) (but there may not be more than two (2) occupants on any such pylon panel) of all or any portion of the Premises. All signage installed by Landlord and Tenant hereunder shall comply with applicable Legal Requirements.

Section 7.4 <u>Cooperation</u>. Landlord, upon request, shall execute any consents or applications which may be required by applicable Legal Requirements to permit the

placement, installation, and/or replacement by Tenant of any signs on any part of the Premises or on any pylon or monument, to which Tenant may be entitled under this Lease.

Section 7.5 <u>Signage and Building Restrictions</u>. Except for any structures or trees existing in the Shopping Center as of the Effective Date, and any construction barricades or fencing that may be temporarily erected as part of Landlord's Quadrant Development Work, Landlord shall not permit any obstructions (including, without limitation, any trees, bushes or other landscaping, scaffolding or architectural details) to obscure Tenant's storefront, storefront signs or other exterior wall signs or any pylons, monuments or other freestanding signs and Landlord shall trim any trees, bushes or other landscaping to eliminate such obstruction.

ARTICLE 8
ALTERATIONS AND IMPROVEMENTS

Section 8.1 Alterations and Improvements.

8.1.1 Tenant shall not perform any alterations or improvements which are structural or which change the exterior of the Premises (except to the extent same pertain to Tenant's Work) without the prior approval of Landlord, not to be unreasonably withheld or delayed, provided, however, that Tenant's alterations of the exterior of the Premises to conform to Tenant's then-current prototypical elevation shall not require Landlord's consent provided that such exterior alterations or improvements (a) are architecturally harmonious with the balance of the Shopping Center, (b) do not increase Landlord's repair and maintenance costs under Section 9.2 (unless Tenant agrees to pay for such increases) and (c) do not increase the Floor Area of the Premises. Prior to the commencement of construction of the proposed structural alterations or improvements described in the preceding sentence, Tenant shall provide Landlord with copies of the plans therefor, which delivery of plans shall be for Landlord's consent to the extent such consent is required pursuant to this Section 8.1.1. All work performed by Tenant in connection with structural and non-structural alterations or improvements shall be done at Tenant's sole cost and expense, in a good and workmanlike manner and in compliance with all applicable Legal Requirements. The provisions of this Section 8.1 shall not apply to Tenant's building signage, which shall be governed by the applicable provisions of Article 7 above. Any alterations or improvements undertaken by Tenant shall comply with the Existing Lease Limitations.

- 8.1.2 Subject to the restrictions contained in Section 8.1.1 above with respect to alterations to the exterior of the Premises, Tenant may, from time to time, at its sole cost and expense, without the prior approval of Landlord, make non-structural alterations and non-structural improvements to the interior and/or exterior of the Premises as Tenant deems necessary or desirable, including, but not limited to, electrical systems, heating, ventilation and air conditioning and other mechanical systems, installation of fixtures and equipment, painting, and wall and floor coverings.
- 8.1.3 Tenant shall have the right to subdivide the Premises into no more than two (2) separate stores, each of which must contain at least 5,000 square feet of Floor Area and shall have its own front entrance and access to the loading docks in the rear of the Premises, as well as separately sub-metered utilities.
- 8.1.4 Tenant shall have the exclusive right to erect and maintain an antenna and a satellite dish, and/or such other equipment as Tenant shall reasonably desire, on the roof of the Premises, provided that Tenant: (i) obtains Landlord's prior approval of its plans for the installation of such equipment, (ii) uses a contractor designated or approved by Landlord for all roof penetrations so as not to violate or invalidate any roof warranties maintained by Landlord, if any, (iii) maintains the area where roof penetrations are made while Tenant's equipment is present, (iv) repairs any damage to the roof caused by the making of the roof penetrations, including, but not limited to, the repair of the roof penetrations upon the removal of any equipment installed thereon, and (v) erects and maintains such equipment in accordance with applicable Legal Requirements. Landlord shall have the right to require Tenant to relocate any such antenna, satellite dish and/or such other equipment and Landlord shall reimburse Tenant for the relocation costs and expenses incurred by Tenant, including costs and expenses incurred by Tenant in connection with "after hours" work if reasonably required.
- 8.1.5 Landlord shall execute and return to Tenant all appropriately completed building department or equivalent applications reasonably necessary for Tenant to perform its

- alterations within ten (10) days after Tenant's request therefor, and will reasonably cooperate
 with Tenant in the permitting process, provided such cooperation imposes no costs or liability on
- 3 Landlord.

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- 8.1.6 If any violation of any applicable Legal Requirement which is noted against the Shopping Center or the Premises (other than a violation caused by Tenant) prevents Tenant from obtaining a building permit for any alterations or a certificate of occupancy, then, upon request by Tenant, Landlord shall promptly and diligently cause such violation to be removed of record to the extent required to permit Tenant to obtain its building permit or certificate of occupancy, as the case may be.
 - 8.1.7 Landlord shall not make any alterations to the Premises (including, without limitation, changing the design, color or materials of the exterior of the Premises) nor shall Landlord construct an additional floor or floors above the Premises. Landlord shall neither make nor permit to be made any alterations to the exterior architectural theme of the remainder of the Southwest Quadrant which would be inconsistent with a first-class shopping center in the state in which the Shopping Center is located (exclusive of other tenants' entrance features) without the prior consent of Tenant. Landlord covenants and agrees that with respect to the buildings to be constructed in the areas designated as Retail A and Retail A-2, the highest point of the roof shall not exceed twenty nine (29) feet and the height of any architectural feature shall not exceed forty one (41) feet, in each case as measured from the finished floor level.
 - 8.1.8 Tenant shall have the exclusive right to erect and maintain on the roof of the Premises, a passive solar array for the production of electricity (the "System"), provided that Tenant: (i) obtains Landlord's prior approval of its plans for the installation of the System, (ii) uses a contractor designated or approved by Landlord for all roof penetrations so as not to violate or invalidate any roof warranties maintained by Landlord, if any, (iii) maintains the area where roof penetrations are made while the System is present, (iv) repairs any damage to the roof caused by the making of the roof penetrations, including, but not limited to, the repair of the roof penetrations upon the removal of any component of the System, (v) erects and maintains the System in accordance with applicable Legal Requirements, (vi) the installed System is not visible to customers in the Shopping Center, (vii) uses the System solely for supplementing Tenant's own energy needs in the Premises and not for the resale of energy to third parties, and (viii) indemnifies Landlord and holds Landlord harmless from and against any and all claims, actions, damages, liability and expense, including reasonable attorneys' fees, in connection with loss of life, personal injury and/or damage to property arising from or out of the System, except to the extent such claims, actions, damages, liability and expense are caused by the acts or omissions of Landlord, its agents, contractors, licensees or employees, or for which any of said parties may be statutorily liable to third parties. The System shall be deemed to be part of Tenant's Property. Landlord acknowledges and agrees that Tenant or its Affiliate or transferee shall be the exclusive owner and operator of the System and Landlord shall have no right, title or interest in such equipment or any component thereof, notwithstanding that any such equipment may be physically mounted or adhered to the Premises. Landlord acknowledges and agrees that, notwithstanding the System's presence as a fixture on the Premises, Tenant or its Affiliate or transferee is the sole and exclusive owner of: (i) the electricity generated by the System, (ii) the environmental attributes of the System, and (iii) any and all credits (including tax credits), rebates, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled, resulting from the environmental or related attributes of the System. Without the express written consent of Tenant, Landlord shall not make or publish any public statement or notice regarding any environmental incentive relating to the System or any environmental attribute of the System or the energy output from the System.
 - 8.1.9 Landlord and Tenant agree that in the event that Tenant shall perform or cause to be performed any alterations or improvements (including without limitation Tenant's Work) to, or within, the Premises which would cause an owner or occupant of the Premises to be entitled to an "Energy Rebate" (hereinafter defined), then Tenant shall be solely entitled to the benefit of such Energy Rebate. As used herein, an "Energy Rebate" shall be deemed to be any rebate, refund, voucher, credit, tax relief, abatement, or other monetary inducement (such as, for examples only, energy efficiency incentives, property tax abatements, sales tax refunds, tax credits, governmental grants, utility rebates or refunds) given by a governmental, nongovernmental, private or public utility, or other entity as a result of efforts to conserve energy or other utilities or cause property or processes to be more environmentally friendly. In addition to the foregoing, Tenant shall be entitled to receive any and all other incentives which Tenant may

1 negotiate with state and local officials pertaining to construction and/or remodeling of the Premises, hiring of employees, property tax abatements, sales tax refunds and/or any other 3 "Incentives" (hereinafter defined) secured. The term "Incentive" is to include, but is not limited 4 to, any cost reduction, rebate, or any other benefit negotiated by Tenant and obtained by 5 Landlord that may directly or indirectly benefit Tenant. If any such Energy Rebate and/or 6 Incentive is required to be paid or credited directly to Landlord, then: (i) Landlord shall elect to 7 take the Energy Rebate and/or Incentive in a lump sum, or if that is not permitted, then in the 8 shortest number of installments possible, so as to permit Tenant to recoup the full amount of the 9 Energy Rebate and/or Incentive during the Term of this Lease, and (ii) within thirty (30) days 10 after Landlord's receipt of the Energy Rebate and/or Incentive, Landlord shall deliver a check to 11 Tenant for such amount, or in the alternative, Tenant shall be entitled to offset the full amount of 12 such Energy Rebate and/or Incentive against the next succeeding installment(s) of Rent then 13 payable under the Lease. 14 ARTICLE 9 15 REPAIRS 16 Tenant's Repairs. Subject to the provisions of Articles 10 and 11 Section 9.1 17 hereof, and except as otherwise provided in Section 9.2 below, Tenant shall maintain in good 18 condition and repair, at its sole cost and expense: (i) the non-structural, interior elements of the 19 Premises (including plate glass, storefront windows, doors, door closure, window and door 20 frames, molding, locks and hardware and the electrical, plumbing, mechanical, and/or alarm 21 systems located in, or serving exclusively the Premises); (ii) the heating, ventilation and air 22 conditioning ("HVAC") units exclusively serving the Premises; (iii) during the first twelve (12) 23 calendar months only after the Rent Commencement Date (the "Tenant Repair Period"), the 24 improvements which constitute Tenant's Work, including, without limitation, the roof and 25 structural components of the Premises; (iv) the fixtures within the Premises; and (v) any damage 26 to the Premises or the Shopping Center which is occasioned by (A) the act or omission of 27 Tenant, its employees, agents or contractors, or (B) any breach by Tenant of any provision of this Lease. All repairs and replacements on Tenant's part to be performed hereunder shall be at 28 29 Tenant's sole cost and expense, and performed in a good and workmanlike manner in accordance 30 with all applicable Legal Requirements. 31 Landlord's Repairs. Subject to the provisions of Articles 10 and Section 9.2 32 11 hereof and except as otherwise provided in Section 9.1 above, Landlord shall perform, as the 33 same shall from time to time be necessary, all repairs and replacements to the following: 34 (a) the buildings of the Shopping Center as necessary to maintain 35 same in good condition and repair (including, without limitation, repainting the exterior walls of 36 the buildings of the Shopping Center (including, without limitation, the Premises)) as same may 37 be reasonably required from time to time during the Term; 38 after the Tenant Repair Period, the structural elements of the 39 Premises, which shall be deemed to include, without limitation, the roof joists, columns, 40 footings, foundation, exterior walls (including, without limitation, repainting, but excluding plate glass, storefront windows, doors, door closure devices, window and door frames, molding, 41 42 locks and hardware, and painting or other treatment of interior walls), floor (but not the floor 43 covering, unless the same is damaged as a result of a floor defect or settling), and the structural 44 elements of any building of which the Premises may be a part; 45 after the Tenant Repair Period, the roof, gutters, flashings, 46 downspouts and scuppers; 47 (d) the electric, gas, water, sanitary sewer, and other public utility lines serving the Premises, to the point of connection to the Premises (including, without limitation, 48 any fire pump facilities or electrical switch gear serving the Premises); 49 50 all electric, gas, water, sanitary sewer, and other public utility lines (e) 51 and ducts in or passing through the Premises which do not exclusively serve the Premises; and 52 any damage to the Premises or the Shopping Center which is occasioned by (A) the act or omission of Landlord, its employees, agents or contractors, or (B) 53

any breach by Landlord of any provision of this Lease.

All repairs and replacements on Landlord's part to be performed hereunder shall be at Landlord's sole cost and expense, performed in a good and workmanlike manner in accordance with all applicable Legal Requirements, and without material interference with or disruption to the normal conduct of any business operations in the Premises. Landlord shall give Tenant at least three (3) business days' prior notice of any repairs or replacements to, or which would otherwise affect the normal conduct of any business operations in, the Premises (except in the case of an emergency posing imminent risk of material harm to persons or property, in which event Landlord shall only be required to give such notice as is reasonable under the circumstances). If, in Tenant's reasonable judgment, Landlord's repairs would materially interfere with or disrupt the normal conduct of any business operations in the Premises, Landlord shall perform such repairs only after the regular hours of operation of Tenant and any other occupant of the Premises (or any portion thereof), and Landlord shall reimburse Tenant for the reasonable costs and expenses incurred by Tenant for utility charges in connection with such "after hours" repairs, and in the event any such repairs are required during the one year period following the Delivery Date, security expenses and over-time payments to Tenant's employees. In the event Landlord does not reimburse Tenant for any amounts payable to Tenant hereunder within thirty (30) days after Tenant's demand therefor, Tenant shall have the right (in addition to any rights and remedies to which it may be entitled under this Lease, at law, or in equity) to offset such amounts against Rent, together with interest thereon at the Lease Interest Rate from the date of outlay until reimbursement or full satisfaction by credit.

Section 9.3 <u>Legal Compliance Work</u>. Except as hereinafter expressly provided, Landlord shall be responsible, at its sole cost and expense (and not includable in Common Areas Charges), for performing all "Legal Compliance Work" (hereinafter defined). Notwithstanding the foregoing, Tenant shall be responsible, at its sole cost and expense, for the performance of Legal Compliance Work: (a) pertaining to the interior elements of the Premises which are not structural; or (b) required solely as a result of Tenant's specific manner of use of the Premises (*i.e.*, are not of general applicability to tenants and occupants of the Shopping Center); provided, however, that the foregoing shall not relieve Landlord of its obligations to perform: (x) Landlord's Work in accordance with all Legal Requirements, and (y) the repairs required in this Lease. As used herein, "Legal Compliance Work" shall mean any obligation, addition, alteration, improvement, or rebuilding, structural or otherwise, to or of the Premises, the Shopping Center, or any part thereof, as applicable, which may be required by reason of any Legal Requirement.

ARTICLE 10 INDEMNIFICATION, INSURANCE AND WAIVER OF SUBROGATION

Section 10.1 <u>Mutual Release, Waiver of Subrogation and Mutual Indemnification.</u>

10.1.1 Mutual Waiver of Claims. Landlord and Tenant, on their own behalf and on behalf of anyone claiming under or through either one by way of subrogation, hereby release and waive all rights of recovery and causes of action against each other and their respective Affiliates from any and all liability for any loss or damage to property or resulting from damage to such property (and, in either case, any resulting loss of business or rental income), whether caused by the negligence or fault of the other party, which is normally insured under Special Form property insurance (so-called "All-Risk") and time element insurance required to be maintained hereunder. In the event either Landlord or Tenant is a self-insurer or maintains a deductible (as either may be permitted hereunder), then the self-insuring party or the party maintaining the deductible hereby releases the other party from any liability arising from any event which would have been covered had the required insurance been obtained and/or the deductible not been maintained.

10.1.2 <u>Waiver of Subrogation</u>. Landlord and Tenant shall cause each property insurance policy carried by either of them insuring the Premises, the contents thereof, or the Shopping Center, to provide that the insurer waives all rights of recovery by way of subrogation or otherwise against the other party hereto (and all of such other party's Affiliates) in connection with any loss or damage which is covered by such policy or that such policy shall otherwise permit, and shall not be voided by the releases provided above.

10.1.3 Mutual Indemnification.

Except as otherwise provided in Subsections 10.1.1 and 10.1.2 above, Tenant covenants to defend and indemnify Landlord and hold Landlord harmless from and against any and all claims, actions, damages, liability and expense, including reasonable attorneys' fees, (x) in connection with loss of life, personal injury and/or damage to property arising from or out of any occurrence in or upon the Premises, or any part thereof, or (y) occasioned wholly or in part by any act or omission of Tenant, its agents, contractors, employees, servants, or licensees, except to the extent such claims, actions, damages, liability and expense are caused by the acts or omissions of Landlord, its agents, contractors, licensees, employees, or other tenants and occupants, or for which any of said parties may be statutorily

(b) Except as otherwise provided in Subsections 10.1.1 and 10.1.2 above, Landlord covenants to defend and indemnify Tenant and hold Tenant harmless from and against any and all claims, actions, damages, liability and expense, including reasonable attorneys' fees, (x) in connection with loss of life, personal injury and/or damage to property arising from or out of any occurrence in or upon any portion(s) of the Shopping Center (excluding the Premises), or (y) occasioned wholly or in part by any act or omission of Landlord, its agents, contractors, employees, servants, tenants (other than Tenant), occupants or licensees, except to the extent such claims, actions, damages, liability and expense are caused by the acts or omissions of Tenant, its agents, contractors, licensees or employees, or for which any of said parties may be statutorily liable.

Section 10.2 Tenant's Insurance.

10.2.1 Tenant's Insurance. Tenant, at its own cost and expense, shall maintain in full force and effect from and after the Delivery Date, and throughout the Term: (i) commercial general liability insurance protecting and insuring Tenant, naming Landlord as "additional insured-lessor" for claims arising out of the use or occupancy of the Premises by Tenant and the obligations assumed by Tenant under this Lease, and having a combined single limit of liability of not less than Ten Million Dollars (\$10,000,000) for bodily injury, death and property damage liability; and (ii) Special Form (so-called "All-Risk") property insurance, on a replacement cost basis, in an amount adequate to cover the full insurable replacement value of all of Tenant's Property and, after completion of Tenant's Work, subsequent leasehold improvements performed by Tenant (excluding Tenant's Work). At any time that Tenant sells liquor, Tenant's commercial general liability insurance shall include coverage for liquor liability.

10.2.2 <u>Self-Insurance</u>. All insurance required to be maintained under this Section 10.2 may be: (i) insured under an individual policy covering this location, or a blanket policy or policies which includes other liabilities, properties and locations of Tenant or its Affiliates; (ii) self-insured by Tenant via a deductible, a formal plan of self-insurance, or otherwise, provided that Tenant or any guarantor of Tenant's obligations under this Lease maintains, during the period of such self-insurance, a net worth of at least Fifty Million Dollars (\$50,000,000); or (iii) insured or self-insured by Tenant through a combination of any of the foregoing insurance programs.

Section 10.3 Landlord's Insurance.

10.3.1 <u>Liability Insurance</u>. Landlord shall maintain in full force and effect from and after the Effective Date and throughout the Term commercial general liability insurance with regard to the Shopping Center protecting and insuring Landlord, naming Tenant as "additional insured-lessee", and having a combined single limit of liability of not less than Ten Million Dollars (\$10,000,000) for bodily injury, death and property damage liability.

10.3.2 Special Form Property Insurance. Landlord shall procure and maintain in full force and effect from and after the Effective Date and throughout the Term Special Form (so-called "All-Risk") property insurance (including loss of rents for a minimum period of one (1) year), endorsements for coverages for flood for the Southwest Quadrant only (if the Southwest Quadrant is located in a flood zone), earthquake and earth movement [sinkholes] (if customarily carried by landlords of first-class shopping centers in the Daly City metropolitan area), windstorm, and Ordinance or Law coverage, on a replacement cost basis, in an amount adequate to cover the full insurable replacement value of all of the buildings (including the

- Premises and Tenant's Work) and other insurable improvements in the Shopping Center; provided, however, in no event shall such insurance cover Tenant's Property or any subsequent improvements made to the Premises by Tenant after completion of Tenant's Work. All property insurance policies required to be maintained by Landlord pursuant to this Subsection 10.3.2 shall provide that any proceeds thereof shall be deposited with Landlord's Mortgagee, or if none, to Landlord, in either event to be held in trust by such party and disbursed only in accordance with the provisions of, and for the purposes set forth in, Section 11.1 hereof. The property insurance required to be maintained by Landlord pursuant to this Section (excluding coverage for windstorm, flood and earthquake) shall not have deductibles exceeding One Hundred Thousand Dollars (\$100,000) without Tenant's prior consent, provided that the deductibles carried by Landlord for windstorm, flood and earthquake are commercially reasonable.
 - 10.3.3 Tenant's Share of Insurance Premiums. Landlord acknowledges and agrees that Tenant shall not be responsible for any payment to Landlord of any insurance premiums in connection with the Shopping Center and/or the Premises, which payments are deemed to be included in Common Area Charges.

Section 10.4 General Insurance Requirements.

10.4.1 All insurance required to be maintained by the parties under this Lease shall be maintained with insurance companies qualified to do business in the state in which the Shopping Center is located, and rated at least A-/VIII by the most current Best's Key Rating Guide (or its equivalent, if such Guide ceases to be published). Each party shall use its diligent efforts to have its insurers provide thirty (30) days (ten (10) days in the event of non-payment of premium) prior notice to the other party of cancellation or non-renewal of any policy required hereunder. Each policy carried by either party shall be written as a primary policy not contributing with, and not in excess of, coverage carried by the other. Each party shall provide to the other duly executed certificates evidencing the insurance coverage described in Sections 10.2.1 and 10.3 above. Any insurance policies in favor of Landlord shall name Equity One Realty & Management CA, Inc., as an additional insured. Tenant shall deliver these insurance policies or certificates thereof, reasonably satisfactory to Landlord, issued by the insurance company to Landlord prior to the Delivery Date and thereafter prior to the expiration date of each policy.

10.4.2 The liability insurance requirements under Sections 10.2 and 10.3 above shall be reviewed by Landlord and Tenant every five (5) years for the purpose of mutually increasing (in consultation with their respective insurance advisors) the minimum limits of such insurance to limits which shall be reasonable and customary for similar facilities of like size and operation in accordance with generally accepted insurance industry standards. The replacement value of the buildings and other insurable improvements constituting the Shopping Center shall be re-evaluated from time to time at the request of either Landlord or Tenant.

ARTICLE 11 FIRE AND OTHER CASUALTY; EMINENT DOMAIN

Section 11.1 Fire and Other Casualty.

11.1.1 (a) Except as otherwise provided in this Section 11.1, if all or a portion of the Premises, the Common Areas (including all improvements thereto), the Enclosed Mall or the Southwest Quadrant (collectively, the "Restoration Area")shall be damaged by fire or other casualty, Landlord shall promptly rebuild and restore the same to the condition existing on the date immediately prior to such fire or other casualty, which restoration shall exclude all of Tenant's leasehold improvements performed by Tenant after the completion of Tenant's Work and Tenant's Property. The proceeds of the policies required to be obtained and maintained by Landlord pursuant to Subsection 10.3.2 hereof shall, to the extent necessary, be used for the performance of such rebuilding and restoration work. Landlord shall give Tenant at least sixty (60) days' prior notice of the date on which the restoration work to the Premises will be Substantially Completed. In the event Landlord's insurance proceeds are insufficient to complete such work, Landlord shall provide the balance of the amount necessary to rebuild or restore the Shopping Center in the manner provided in this Section 11.1.1.

(b) Notwithstanding the foregoing, if any portion of the Premises are so damaged or destroyed, Tenant shall have the right to require Landlord to make changes to the

- Premises in the course of, and as part of, such rebuilding or restoration work, which changes are 2 in excess of Landlord's rebuilding and restoration obligations set forth in Section 11.1.1(a) 3 above. If the net cost and expense of such rebuilding or restoration work is increased solely as a 4 result of such changes (taking into consideration any and all actual reduced and additional costs 5 resulting from such changes and/or other cost savings arising therefrom), then Tenant shall pay 6 to Landlord, as Additional Rent, the amount of such net increase, which amount shall be due and 7 payable within thirty (30) days after Landlord has delivered to Tenant invoices evidencing such 8 increase and other supporting documentation as may be reasonably required by Tenant (but in 9 no event earlier than the occurrence of the date on which possession of the restored areas of the 10 Premises are delivered to Tenant). To the extent that Landlord's substantial completion of such rebuilding or restoration work is delayed solely as a result of such changes (taking into 11 12 consideration any and all reasonable time savings to Landlord resulting from such changes), then 13 the applicable period(s) specified in Section 11.1.2 below shall be appropriately adjusted to the 14 extent of such net delay. 15 If, in Tenant's reasonable judgment, any damage to the Premises (c) 16
 - (c) If, in Tenant's reasonable judgment, any damage to the Premises renders all or any portion of the Premises unusable for the conduct of Tenant's business or, in the case of any damage to the Shopping Center, materially interferes with the normal conduct of any business operations in the Premises, the Rent shall be equitably reduced or totally abated based upon the extent to which the remaining portion of the Premises may, in Tenant's reasonable judgment, be utilized for its normal conduct of business.

11.1.2 In the event that:

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- (a) Landlord does not commence the repair and restoration work to the Restoration Area as required pursuant to this Section 11.1 within one hundred eighty (180) days after the date of such destruction (subject to the Restoration Extension, as defined below), or thereafter fails to diligently pursue the completion of such repair and restoration work (subject to Force Majeure or such period as may be reasonably necessary for the adjustment of insurance proceeds, not to exceed sixty (60) days in the aggregate); or
- 28 (b) the required repairs and restorations to the Restoration Area are not
 29 Substantially Completed by Landlord in accordance with the provisions of this Section 11.1
 30 within one (1) year after the date of destruction (which period may be extended by reason of an
 31 event of *Force Majeure*, not to exceed ninety (90) days in the aggregate, provided that Landlord
 32 shall have given Tenant notice thereof promptly after its occurrence and subject to the
 33 Restoration Extension, as defined below),
 - then, in either of such events, Tenant shall have the right, at its sole discretion and option, to:
- after giving thirty (30) days' prior notice to Landlord (and 35 Landlord's continued failure to commence and diligently pursue such repairs and restoration 36 work to completion), perform or complete, as the case may be, said work (or any portion thereof) 37 on Landlord's behalf and at the sole cost of Landlord, which cost Landlord shall pay to Tenant 38 during the course of such repairs within thirty (30) days after Tenant's delivery to Landlord of an 39 invoice therefor and, in default of any such payment, Tenant shall have the right to offset the 40 amount thereof, together with interest at the Lease Interest Rate, against the Rent next accruing 41 42 hereunder; provided, however, that Tenant's right to make such repairs and restoration on Landlord's behalf shall be limited to the Premises, access routes to Tenant's loading dock, 43 Tenant's signage and trash facilities, and the Critical Areas (it being agreed, without limiting the 44 foregoing provisions of this Subsection 11.1.2, that at Tenant's election all insurance proceeds 45 paid or payable to Landlord or Landlord's Mortgagee pursuant to Section 10.3 hereof shall be 46 paid (or, as applicable, in turn delivered) directly to Tenant, to be applied to such work by Tenant 47 48 as same is being performed); or
 - (ii) seek to obtain specific performance of Landlord's repair and restoration obligations pursuant to the laws of the state in which the Shopping Center is located; provided, however, that Tenant's right to seek specific performance shall be limited to repair and restoration of the Premises, the Critical Area, and Tenant's loading and trash removal facilities and Tenant's signage; or
- 54 (iii) terminate this Lease by thirty (30) days' notice to Landlord.

1 2 3 4 5 6 7 8 9 10 11 12	In addition to the foregoing, it, in the opinion of an independent licensed architect designated by Tenant (and reasonably acceptable to Landlord), the required repairs and restorations to the Restoration Area cannot be completed by Landlord in accordance with the provisions of this Section 11.1 within one (1) year after the date of destruction, Tenant shall have the right, at its sole discretion and option, to terminate this Lease by giving Landlord at least thirty (30) days' notice thereof, which notice shall be given no later than the date which is ninety (90) days after the date of the casualty, after which 90-day period Tenant shall be deemed to have waived its termination right. If Tenant has not waived its termination right within thirty (30) days after the date of the casualty, then the 180 day period referred to in Section 11.1.2(a) above and the one (1) year period referred to in Section 11.1.2(b) above shall each be extended one (1) day for each day that Tenant has not waived its termination right after such thirty (30) day period (the "Restoration Extension").			
13	11.1.3 If the Premises are substantially destroyed by fire or other casualty during			
14 15	the last two (2) years of the Term to the extent of more than one-third (1/3) of the Floor Area thereof, Landlord or Tenant shall each have the right to terminate this Lease as of the date of			
16 17 18 19	such damage or destruction by giving notice within thirty (30) days following such damage or destruction, but Tenant may negate any termination by Landlord by agreeing to extend the Term for an additional five (5) year period by exercising an option pursuant to Subsection 2.2.2 hereof if available, within ten (10) days after receipt of the termination notice from Landlord.			
20	Section 11.2 <u>Eminent Domain</u> .			
21 22 23 24	11.2.1 As used in this Section 11.2, " <i>Taking</i> " or " <i>Taken</i> " shall mean a taking for any public or quasi-public use by any lawful power or authority by exercise of the right of condemnation or eminent domain or by agreement between Landlord and those having the authority to exercise such right.			
25 26 27 28	11.2.2 If all of the Premises shall be Taken, this Lease shall terminate as of the date of vesting of title or transfer of possession, whichever is earlier, without further liability on the part of either Landlord or Tenant, except for an adjustment between the parties for the Rent payable by Tenant hereunder.			
29	11.2.3 In the event that:			
30 31 32	(a) any portion of the Premises shall be Taken so that it is commercially unreasonable or unfeasible for Tenant, in its reasonable judgment, to conduct its normal business in the Premises;			
33 34 35 36 37 38	(b) as a consequence of any Taking: (i) portions of the Shopping Center shall be divided or separated in any manner that it materially interferes with parking, visibility, or access to the Premises from other portions of the Shopping Center, or (ii) the Shopping Center no longer has all of the entrances designated Critical Access Ways on Exhibit B, and as a result, it is not commercially reasonable or feasible for Tenant, in its reasonable judgment, to conduct its normal business in the Premises;			
39 40 41	(c) there occurs, in Tenant's reasonable judgment, a denial of adequate access to the Shopping Center at the grade of any street adjoining the Shopping Center or to any easement granted under this Lease, whether or not a Taking shall have occurred;			
42 43	(d) any portion of the Shopping Center shall be Taken which materially interferes with parking, visibility or access to the Premises, and as a result of such			
44 45	taking it is commercially unreasonable or unfeasible for Tenant, in its reasonable judgment, to conduct its normal business in the Premises;			
46 47	(e) more than twenty-five (25%) percent of the total Floor Area of all of the buildings in the Restoration Area (other than the Premises) are Taken; or			
48 49 50 51 52	(f) five (5%) percent or more of the parking spaces located in the Critical Area are Taken, or if so many of the parking spaces in the Shopping Center are Taken such that there are fewer than (i) 4.0 parking spaces for every one thousand (1,000) square feet of Floor Area in the Shopping Center, or (ii) the number of parking spaces required by applicable Legal Requirements;			

- then, in any of such events, Tenant shall have the right to terminate this Lease by giving at least
- 2 sixty (60) days' prior notice to Landlord within sixty (60) days of any such event, in which event
- 3 this Lease shall terminate without any further liability on the part of either Landlord or Tenant,
- 4 except for an adjustment between the parties for the Rent payable by Tenant hereunder and for
- 5 payment to Tenant for its share of the award for the taking pursuant to Subsection 11.2.5 below.
- 6 Upon any partial Taking of the Premises, the Rent shall be equitably reduced or totally abated
- 5 based upon the extent to which the remaining portion of the Premises may, in Tenant's
- 8 reasonable judgment, be utilized for its normal conduct of business.
- 9 If the Premises are reduced by twenty five percent (25%) or more, or a material portion of the
- 10 Restoration Area is taken by condemnation so as to render, in Landlord's reasonable judgment,
- the remainder unsuitable for use as a retail shopping center then, in either of such events,
- 12 provided Landlord terminates all of the leases in the Restoration Area, Landlord shall have the
- 13 right to terminate this Lease by giving at least sixty (60) days' prior notice to Tenant within sixty
- 14 (60) days of any such event, in which event this Lease shall terminate without any further
- 15 liability on the part of either Landlord or Tenant, except for an adjustment between the parties
- for the Rent payable by Tenant hereunder and for payment to Tenant for its share of the award
- for the taking pursuant to Subsection 11.2.5 below.

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11.2.4 If this Lease is not terminated pursuant to this Section 11.2, Landlord, at its sole cost and expense, within a reasonable period of time after such Taking, shall repair and restore the area not so Taken to tenantable condition, similar in physical appearance to the condition of the area immediately prior to the Taking, pursuant to plans and specifications reasonably approved by Tenant (which repair and restoration shall, as applicable, exclude leasehold improvements performed by Tenant subsequent to the completion of Tenant's Work and Tenant's Property), and any and all amounts awarded to Landlord for any Taking shall be made available to and used by Landlord for any rebuilding or restoration which it is required to perform hereunder. During the period of such repairs and restoration, all Rent shall abate to the extent that the Premises may not, in Tenant's reasonable judgment, be used by Tenant for the normal conduct of its business. Such abatement shall terminate in accordance with the terms of Section 11.3 below. Landlord shall give Tenant at least sixty (60) days' prior notice of the date on which the restoration work to the Premises will be Substantially Completed. In connection with any Taking or partial Taking of the Premises, Tenant shall be entitled to claim an award for loss of business, leasehold improvements, fixtures and equipment and removal and reinstallation costs; provided, however, that no award shall be payable to Tenant which reduces the award payable to Landlord for its fee interest in the Premises.

11.2.5 Any dispute between the parties with respect to this Section 11.2 shall be resolved by arbitration in accordance with the provisions of Section 16.3 below.

Section 11.3 <u>Abatement of Rent Charges</u>. Notwithstanding any other provisions of this Lease, if the Fixed Rent and Additional Rent payable by Tenant hereunder shall be abated pursuant to Sections 11.1 or 11.2 above, such abatement shall terminate upon the first to occur of: (a) the date on which Tenant shall reopen the Premises to the general public for business; or (b) the expiration of the period which is ninety (90) days after Landlord shall have completed such repairs and restoration work as Landlord is obligated to perform hereunder and the interference with the operation of business in the Premises has ceased.

ARTICLE 12 COVENANTS, REPRESENTATIONS AND WARRANTIES

Section 12.1 <u>Quiet Enjoyment</u>. Tenant shall peaceably and quietly have, hold, occupy and enjoy the Premises for the Term, without hindrance from Landlord or any party claiming by, through, or under Landlord.

Section 12.2 <u>Authority</u>. Tenant and Landlord each warrant and represent that the person(s) signing this Lease on their behalf has authority to enter into this Lease and to bind Tenant and Landlord, respectively, to the terms, covenants and conditions contained herein. The submission of this Lease to each party hereto shall be for examination and negotiation purposes only, and does not and shall not constitute a reservation of or an obligation of Tenant to lease, or otherwise create any interest of Tenant in, the Premises or any other premises situated in the Shopping Center unless and until the Lease is fully executed and delivered by Tenant and

56 Landlord.

Section 12.3 Landlord's Covenants, Warranties and Representations. To induce 2 Tenant to execute this Lease, and in consideration thereof, Landlord covenants, warrants and 3 represents to Tenant as follows: As of the Effective Date, Landlord has, and as of the Delivery Date 4 5 shall have, fee simple title to the entire Shopping Center, free and clear of all easements, 6 restrictions, liens, encumbrances, leases and the like, except for the encumbrances and restrictions described on Exhibits E, K-1, L and N hereto. 7 8 In the event the legal description of the Shopping Center described 9 in Exhibit A hereto indicates that the Shopping Center is composed of more than one parcel or 10 lot, Landlord represents that there exist no strips or gores between such parcels or lots which are 11 not owned by Landlord; 12 No third party consents or approvals are required in order for 13 Landlord to enter into this Lease or for the performance of Landlord's Work (excluding, as of the 14 Effective Date, governmental permits and approvals such as, without limitation, the Required 15 Land Use Approvals); 16 (d) [Intentionally Deleted]; 17 The Shopping Center now has, and on the Delivery Date shall have 18 access to and from Serramonte Boulevard, as shown on Exhibit B hereto, for the passage of 19 vehicular traffic; 20 Excluding any matters disclosed in Exhibit K-1, this Lease does 21 not violate the provisions of any instrument heretofore executed and/or binding on Landlord, or 22 affecting or encumbering the Shopping Center, or the Premises, and no rights granted by 23 Landlord to Tenant under the terms of this Lease conflict with any rights granted by Landlord to 24 any other tenant or occupant in the Shopping Center (including, without limitation, any rights of 25 first offer or first refusal or the like); 26 As of the Effective Date, except for Landlord obtaining the 27 Required Land Use Approvals, there are no restrictions or other legal impediments imposed by 28 any public or private instrument which would prevent: (i) the use of the Premises for the 29 Permitted Use; (ii) the use of the parking facilities, access roads, and other Common Areas in the 30 manner contemplated by this Lease; or (iii) subject to compliance with applicable Legal 31 Requirements and Tenant obtaining Tenant's Permits, the performance of Tenant's Work; 32 As of the Effective Date, there are no restrictive covenants, 33 uniform sign plans or other signage restrictions (except for governmental sign ordinances, if any) 34 which would prevent the Premises from having the signage (including, without limitation, the 35 square foot area and size of letters) as depicted on Exhibit D-1 and Exhibit F hereof. 36 (i) [Intentionally Deleted]; 37 Attached hereto as Exhibit K-2 is a complete list of all fully executed and delivered leases in effect on the Effective Date with respect to the Shopping Center 38 39 (the "Existing Leases"); and 40 Landlord shall reasonable efforts to forward to Tenant any notice (k) or other communication (a "Hearing Notice") received by Landlord from any owner of property 41 adjoining or adjacent to the Shopping Center or from any municipal or other governmental 42 43 authority, in connection with any hearing or other administrative proceeding relating to any 44 proposed zoning, building code, signage, or related variance affecting the Shopping Center or 45 any adjoining or adjacent property, which, if granted, could materially and adversely affect 46 Tenant's use or occupancy of the Premises, the conduct of Tenant's business therein, or Tenant's rights and benefits under this Lease. If Landlord fails to deliver such Hearing Notice and Tenant 47 learns of such events that are the subject of the Hearing Notice, then Tenant shall request 48 49 Landlord to deliver a copy of the Hearing Notice and if Landlord fails to do so within ten (10) days after receipt of Tenant's written request, Landlord shall be in default hereof (but except for 50 51 such failure to deliver the Hearing Notice within such 10-day period, Landlord shall not 52 otherwise be in default under this Section 12.3(k)). Landlord, at its sole cost and expense, shall 53 appear in such proceeding and shall contest such proposed variance. If Landlord fails so to

appear and contest such proposed variance after receiving five (5) days' notice from Tenant (or 2 such shorter notice as may be practicable under the circumstances), then Tenant shall be entitled 3 (but shall not be obligated to), in its own name and/or in the name of Landlord, to appear in such 4 proceeding, in which event Landlord shall fully cooperate with Tenant, provide such 5 information, and execute any documents or other instruments as Tenant may reasonably request 6 in connection with any such proceeding. 7 Section 12.4 Environmental Matters. 8 12.4.1 Definitions. 9 As used herein, the term "Environmental Laws" shall mean any (a) 10 and all Legal Requirements concerning the protection of the environment, human health or 11 safety. 12 (b) As used herein, the term "Hazardous Substances" shall mean each and every element, compound, material, mixture, substance, waste, hazardous substance, 13 14 hazardous waste, hazardous material, toxic substance, pollutant or contaminant either as those 15 terms are defined in any of the Environmental Laws or the presence of which may cause liability 16 at common law, including, without limitation, asbestos and/or asbestos-containing products, 17 whether or not currently friable. 18 As used herein, the term "Environmental Notice" shall mean a 19 summons, citation, directive, order, claim, notice, litigation, investigation, judgment, legal 20 pleading, letter or other communication, written or oral, actual or threatened, from the United 21 States Environmental Protection Agency or other federal, state or local governmental agency or 22 authority, or any other private individual or entity concerning (i) any Hazardous Substances at, 23 on, in, under or emanating from the Premises or the Shopping Center (including, without 24 limitation, the Southwest Quadrant); (ii) any violation or potential violation of Environmental 25 Laws at the Premises or the Shopping Center; or (iii) any underground storage tanks on the 26 Premises or the Shopping Center. 27 As used herein, the term "Releasing" or "Release" shall mean 28 releasing, spilling, leaking, discharging, disposing or dumping or otherwise introducing any 29 substance into the environment or into any building or other improvements in violation of 30 Environmental Laws. 31 As used herein, the term "Compliance Costs" shall mean any and 32 all costs incurred by a party in complying with applicable Environmental Laws, including, 33 without limitation, consultant's and engineer's fees; laboratory costs; contractor's and 34 subcontractor's fees; application and filing fees; costs of investigation, monitoring or cleanup of 35 soil or other substrate, surface water, groundwater, or buildings or other improvements; 36 equipment costs; disposal fees; costs of operation and maintenance of equipment; legal fees; other governmental fees or costs; interest at the Lease Interest Rate from the date of expenditure 37 38 until paid in full; and other similar or related costs. 39 As used herein, the term "Tenant Related Parties" shall mean 40 Tenant's agents, servants, employees, contractors or licensees. 41 12.4.2 Compliance with Environmental Laws. Tenant shall comply with all 42 applicable requirements of Environmental Laws governing its use of, and operations at, the 43 Shopping Center and the Premises. Landlord shall comply with all applicable requirements of 44 Environmental Laws relating to the Shopping Center and the Premises, except to the extent such 45 requirements arise from Tenant's operations thereon. 46 12.4.3 Responsibility for Releases of Hazardous Substances. Notwithstanding 47 any other provision of this Lease, Tenant shall only be liable for any Release of Hazardous Substances at, on, in, under or emanating from the Premises or Shopping Center which were 48 49 introduced by Tenant or Tenant Related Parties (hereinafter "Tenant Releases"), including, 50 without limitation, any Compliance Costs required to address Tenant Releases. Landlord shall 51 be liable for any Hazardous Substances at, on, in, under or emanating from the Premises or 52 Shopping Center, including, without limitation, any Compliance Costs attributable to such 53 Hazardous Substances, unless the Hazardous Substances are caused by Tenant Releases. Except

1 2 3 4 5 6 7 8 9 10 11	in the event of an emergency or if compelled by applicable governmental authority and provided that Landlord does not incur any additional expense on account thereof (including without limitation, fines and penalties), any work performed by Landlord relating to Hazardous Substances shall be performed by Landlord at any time other than during the months of August (through Labor Day), November and December, and shall be undertaken in such commercially reasonable manner so as to (i) not adversely affect ingress to or egress from the Shopping Center, (ii) have no adverse effect on the visibility of the Premises or any signs which contain Tenant's name, and (iii) not otherwise materially interfere with the normal conduct of any business operations in the Premises. If the presence of Hazardous Substances, or Landlord's remediative work relative thereto, interferes with Tenant's normal business operations in the Premises, then Tenant shall be entitled to an equitable abatement of Rent for so long as such condition persists.
12 13 14 15 16	12.4.4 <u>Standards</u> . Except as expressly provided herein, the parties agree that any investigation or remediation of Hazardous Substances, or cure of a violation of Environmental Laws, required to be conducted at the Premises or Shopping Center shall be no more stringent than necessary to meet the minimum standards of Environmental Laws applicable to properties used in the manner the Shopping Center is being used.
17 18 19 20 21 22 23 24 25 26	12.4.5 <u>Landlord's Representations and Warranties</u> . Landlord represents and warrants that: (i) Landlord has received no Environmental Notices concerning the Shopping Center or the Premises; (ii) Landlord has no knowledge of, and has received no notice of, any violation, or potential or alleged violation, of any Legal Requirement, including, without limitation, Environmental Laws, affecting the Shopping Center or the Premises which remains uncured; and (iii) to the best of Landlord's knowledge: (A) no Hazardous Substances are located at, on, in, under or emanating from the Shopping Center or the Premises; and (B) no underground storage tank exists at the Shopping Center or the Premises. The foregoing representations and warranties shall in no way serve to vitiate Landlord's obligations under this Article 12.
27 28	12.4.6 <u>Documents</u> . Each party shall immediately notify the other party of the notifying party's receipt of an Environmental Notice.
29 30 31 32 33 34 35 36 37 38	12.4.7 <u>Indemnity</u> . Each party to this Lease shall indemnify, defend and hold the other party, and its agents, servants, shareholders, directors, officers, partners, members and employees harmless from any and all claims, losses, expenses, costs, lawsuits, actions, administrative proceedings, damage, orders, judgments, penalties and liabilities of any nature whatsoever, including, without limitation, reasonable attorneys' fees (incurred to enforce this indemnity or for any other purpose) and Compliance Costs, arising from (i) the indemnifying party's breach of any of its representations, warranties, covenants or other obligations under this Section 12.4; (ii) Hazardous Substances for which the indemnifying party is liable under this Section 12.4.
39 40	12.4.8 <u>Survival</u> . The obligations of the parties under this Section 12.4 shall survive the renewal, expiration, breach or earlier termination of this Lease.
41 42 43	12.4.9 <u>Conflict</u> . In the event of any conflict between the provisions of this Section 12.4 and any other provision of this Lease, the provisions of this Section 12.4 shall control.
44 45	ARTICLE 13 USES AND RESTRICTIONS
46	Section 13.1 <u>Permitted and Prohibited Uses</u> .
47 48 49 50	13.1.1 <u>Tenant's Permitted Use</u> . The Premises may be used and occupied for the Permitted Use (defined in Subsection 1.1.25 above). Tenant shall not use the Premises for any of the "Prohibited Uses" (defined in <u>Exhibit L</u> hereto annexed) or the "Existing Exclusives" (hereinafter defined in Subsection 13.3.1), to the extent then applicable.
51 52 53	13.1.2 <u>Prohibited Uses</u> . Landlord shall construct, lease, operate, maintain and manage the Shopping Center as a first-class shopping center comparable to other first-class shopping centers in the state in which the Shopping Center is located. Landlord shall not lease,

rent or occupy or permit to be occupied any portion of the Southwest Quadrant for any of the "Prohibited Uses" (as set forth in <u>Exhibit L</u> hereto annexed).

Section 13.2 <u>Tenant's Exclusive in Center</u>. To induce Tenant to execute this Lease, and subject to all of the terms and provisions of this Section 13.2, Landlord covenants and agrees as follows.

13.2.1 Landlord shall not lease, rent or occupy or permit any other premises in the Southwest Quadrant to be occupied, whether by a tenant, sublessee, assignee, licensee or other occupant or itself, for the storage, sale, rental or distribution, at retail or at wholesale, either singly or in any combination, of items contained in any of the following respective categories of merchandise: (i) infant, juvenile and children's furniture and equipment (including, without limitation, infant, juvenile and children's: cribs, beds, mattresses, bedding, changing tables, gliders, rockers (including coordinating ottomans), high chairs, lamps, walkers, play yards, play pens, car seats, booster seats, cradles, carriages, strollers, toy and clothing chests, swings, or any other furniture or equipment similar to the foregoing enumerated items) (collectively, "Restricted Furniture"); (ii) clothing, layettes, apparel, shoes and/or accessories for infants, juveniles and children 0-4 years in age; and maternity clothing; and (iii) merchandise, products and services targeted for use by or for infants, juveniles and children 0-4 years in age (including, without limitation, infant, juvenile and children's: toys, books, food, formula, indoor and/or outdoor play and recreational equipment, audio and video cassettes or equipment, safety items, feeding items, nursing items, health and beauty care items, drug remedies, diapers, wipes, bathroom items (including, without limitation, personal care devices and other bathroom appliances, accessories and toiletries)) (which items in clauses (i), (ii) and (iii) above, either singly or in any combination, are hereinafter referred to as the "Exclusive Items"). Notwithstanding the foregoing, any tenant or subtenant in the Southwest Quadrant shall have the right to utilize its respective premises for the sale, rental and/or distribution of the Exclusive Items within an aggregate area (which shall include an allocable portion of the aisle space adjacent to such sales, rental and/or distribution area) not to exceed one thousand (1,000) square feet of Floor Area within such tenant's or subtenant's premises. In addition to the foregoing, Landlord shall not lease, rent or occupy or permit any other tenant or occupant of the Southwest Quadrant to operate a (x) hair cutting salon specializing primarily to a clientele of infants, juveniles or children; (y) photo studio specializing primarily to a clientele of infants, juveniles or children; and/or (z) development, learning or fitness center specializing primarily to a clientele of infants, juveniles and children 0-4 years in age similar to a Gymboree, My Gym or Little Gym. The exclusive rights granted to Tenant with respect to any individual item comprising the Exclusive Items (but not any other Exclusive Items) shall be null and void if Tenant fails to use portions of the Premises for the sale, rental or distribution of such item (other than during "Excused Periods," as defined in Section 1.1.8 above) for a period of time exceeding six (6) consecutive months, provided Landlord shall have given Tenant notice of such failure and Tenant shall have at least thirty (30) days to cure such failure prior to the expiration of such six (6) consecutive month period.

13.2.2 The restrictions set forth in Subsection 13.2.1 above shall not apply to a full-line national: (i) department store [for example, Wal-Mart, Macy's, Target or Kohl's]; (ii) discount club [for example, Costco, BJ's Wholesale Club, or Sam's Club]; (iii) home improvement center [for example, Home Depot or Lowe's]; clauses (i), (ii) & (iii) all as commonly located in first-class shopping centers in the state in which the Shopping Center is located, each occupying at least 60,000 square feet of Floor Area within the Shopping Center as such stores are currently operated (as of the Effective Date); and (iv) drug store;. In addition, the restrictions set forth in Subsection 13.2.1 with respect to the Southwest Quadrant shall not apply to (a) the tenant operating under the trade name "Floor and Décor" and "Michael's" (as such retailers operate as of the Effective Date) but shall apply to "Hobby Lobby" and (b) a store that operates primarily as a full-line furniture store, primarily as a mattress store, primarily as a hardware and paint store similar to Ace Hardware., or the juvenile department of a full-line shoe store. Tenant agrees that the foregoing restriction shall not prevent the operation of a typical Ross Dress for Less or similar stores.

13.2.3 The exclusive rights granted to Tenant in this Section 13.2 shall inure to the benefit of any assignee of Tenant's interest in this Lease and to any sublessee of at least fifty percent (50%) of the Floor Area of the Premises.

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13.2.4 (a) Upon breach of the aforesaid covenant and agreement by Landlord (which breach shall not include a situation in which the lease between Landlord and any tenant in the Shopping Center prohibits the tenant therein from violating the exclusive rights granted to Tenant in this Section 13.2 and despite such prohibition, such tenant violates such exclusive rights, unless Landlord fails to comply with any of the provisions of subparagraph (b) below), the Rent payable hereunder shall be reduced by fifty percent (50%) for so long as such violation shall continue, and Tenant shall have all remedies given to it at law and in equity, including, without limitation, the right to obtain injunctive relief and/or to terminate this Lease and/or to commence and prosecute an action against Landlord or any other violator for damages.

(b) If any person or entity (other than Landlord) shall violate any of the exclusive provisions herein set forth, then upon Landlord's receipt of Tenant's notice stating that such person or entity is violating Tenant's exclusive rights, Landlord shall promptly deliver to such person or entity a letter (with a copy to Tenant) demanding that such person or entity cease operating in violation of Tenant's exclusive rights. Notwithstanding the foregoing, Landlord shall not be obligated to commence legal proceedings against such person or entity if Tenant shall have the right (i) to conduct and prosecute such legal proceedings (including, without limitation, an action for injunctive relief) in its own name, at Tenant's expense, or (ii) in the event the right set forth in (i) above is not permitted to be exercised under applicable Legal Requirements, to conduct and prosecute such legal proceedings in the name of Landlord, at Tenant's expense, and Landlord shall cooperate with Tenant with respect to such prosecution (including, without limitation, by executing any documentation or authorization reasonably required by Tenant in connection with such prosecution and by appearing at any hearing or trial with respect to such prosecution). If Tenant prevails in such legal proceedings, Landlord shall reimburse Tenant for its actual out-of-pocket reasonable attorney's fees and court costs.

Section 13.3 Exclusives Which Tenant Must Honor.

13.3.1 Tenant shall honor certain exclusives granted by Landlord to certain other tenants in the Shopping Center pursuant to the terms of leases which have been executed prior to the Effective Date and/or pursuant to any other public or private instrument affecting the Shopping Center (hereinafter, "Existing Exclusives") [a true and complete listing and description of such Existing Exclusives being attached hereto as Exhibit K-1], and shall not sublease, occupy or use all or any portion of the Premises, or permit all or any portion of the Premises to be occupied or used in violation of any such Existing Exclusive (except as may be specifically set forth on Exhibit K-1). Landlord represents and warrants that no Existing Exclusive(s) exist other than those listed on Exhibit K-1 hereto and that Exhibit K-1 is true accurate and complete, and covenants to indemnify, defend and hold Tenant harmless from and against all loss, cost, liability or expense (including, without limitation, reasonable legal fees) incurred by Tenant by reason of the enforcement by any person or entity of such unlisted Existing Exclusive. Notwithstanding the foregoing, (i) Tenant shall be entitled to enter into a separate agreement with any tenant or other occupant for whose benefit the Existing Exclusive is granted which nullifies or modifies the corresponding Existing Exclusive with regard to the Premises; and (ii) Tenant shall not be subject to the exclusive for the benefit of Starbucks on and after August 1, 2016.

13.3.2 Except as expressly set forth in this Section 13.3, Tenant shall not be obligated to honor any exclusive granted by Landlord to any tenant in the Shopping Center.

ARTICLE 14 CONDUCT OF BUSINESS OPERATIONS

Subject to the other provisions of this Lease (including, without limitation, Articles 2 and 3 and Section 12.4.3 hereof), Tenant shall initially open its store for business to the public in the Premises for at least one (1) day, not later than the one hundred eightieth (180th) day after the Rent Commencement Date (which date shall, as applicable, be extended by reason of (A) damage or destruction, eminent domain proceedings or actions, or *Force Majeure*, or (B) the acts or omissions of Landlord). Other than as expressly set forth in the preceding sentence, Tenant shall have no obligation to open or operate any business in the Premises, and shall have the right, at any time, to cease to conduct any business operations in the Premises, and Tenant shall incur no liability to Landlord or its Mortgagee by reason thereof (it being understood and agreed that all of Tenant's obligations under this Lease shall continue unless this Lease is terminated pursuant, *inter alia*, to the further provisions of this Article 14 or any other provision of this

1	Lease [other than by reason of an Event of Default]). In the event that Tenant does not operate				
2	or cause to be operated any retail business in the Premises (other than prior to the Rent				
3	Commencement Date or during Excused Periods) for more than one hundred eighty (180)				
4	consecutive days, Landlord shall have the option to terminate this Lease, which option shall be				
5	exercisable by giving notice thereof to Tenant by not later than the ninetieth (90th) day after the				
6	date on which said 180-day period expires, whereupon this Lease shall terminate upon the				
7	sixtieth (60th) day (the "Recapture Date") after the date on which Tenant receives Landlord's				
8	termination notice, as if the Recapture Date was originally set forth herein as the expiration date				
9	of the Term. Notwithstanding the foregoing, Tenant shall have the right to nullify Landlord's				
10	termination by giving notice to Landlord (the "Reopening Notice"), within ten (10) days after				
11	receiving the Landlord's termination notice, of its decision to reopen the Premises for business				
12	(and in fact Tenant reopens for business fully stocked and staffed within thirty (30) days),				
13	whereupon Landlord's termination notice shall be rendered null and void. Upon such				
14	termination, Landlord and Tenant shall each be released from any and all liabilities thereafter				
15	accruing hereunder, except for those obligations which survive the expiration or other				
16	termination of this Lease pursuant to the express terms of this Lease. All Rent payable by				
17	Tenant hereunder shall be apportioned as of the Recapture Date and Tenant shall promptly pay to				
18	Landlord any amounts so determined to be due and owing by Tenant to Landlord, and conversely				
19	Landlord shall promptly reimburse Tenant for any amounts prepaid by Tenant for periods				
20	subsequent to the Recapture Date.				

ARTICLE 15 TENANT ASSIGNMENT AND SUBLETTING

Section 15.1 Assignment and Subletting.

15.1.1 Tenant shall have the right from time to time, without the consent of Landlord, to assign Tenant's interest in this Lease and/or to sublet, concession or license all or any portion of the Premises, subject to all of the terms and conditions of this Lease (including, without limitation, Section 13.1) and provided the proposed tenant is a tenant typically found in similar shopping centers in California whose use is a retail use that is consistent with the then-existing character and quality of the Shopping Center.

15.1.2 Except with respect to any transaction covered under Subsection 15.1.3 or Section 15.3 below, in the event Tenant proposes to assign this Lease or sublet, in a single transaction, the whole of the Premises, it shall first give notice thereof (the "Assignment/Subletting Notice") to Landlord, which notice shall specify the name and address of the proposed assignee or sublessee and the proposed use of the Premises to be made by such assignee or sublessee. Thereafter, Landlord shall have the option to terminate this Lease, which option shall be exercisable by giving notice to Tenant (the "Termination Notice") thereof within twenty (20) days after receipt of an Assignment/Subletting Notice from Tenant, in which event this Lease shall automatically terminate on the ninetieth (90th) day (the "Termination Date") after the date on which Tenant receives Landlord's Termination Notice, with the same force and effect as if the Termination Date had been designated as the expiration date of this Lease. Upon the Termination Date, Landlord and Tenant shall each be released from any and all liabilities thereafter accruing hereunder, except for those obligations which survive the expiration or other termination of this Lease pursuant to the express terms of this Lease. All Rent payable by Tenant hereunder shall be apportioned as of the Termination Date and Tenant shall promptly pay to Landlord any amounts so determined to be due and owing by Tenant to Landlord, and conversely Landlord shall promptly reimburse Tenant for any amounts prepaid by Tenant for periods subsequent to the Termination Date. Notwithstanding the foregoing, Tenant shall have the right to avoid Landlord's termination by giving notice to Landlord (the "Rescission Notice"), within ten (10) days after receiving the Termination Notice, of its rescission of the Assignment/Subletting Notice, whereupon Landlord's Termination Notice shall be rendered null and void, and Tenant shall not assign this Lease or sublet the whole of the Premises as proposed in its Assignment/Subletting Notice. If Landlord does not give the Termination Notice within the aforesaid 20-day period, Landlord shall conclusively be deemed to have waived its termination rights hereunder with respect to such proposed assignment or subletting transaction, and Tenant may assign this Lease or sublet the entire Premises in accordance with its Assignment/Subletting Notice.

15.1.3 In addition to, and not in limitation of, Tenant's other rights set forth in this Section 15.1, Tenant shall have the right from time to time, without the consent of Landlord,

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- 1 to assign Tenant's interest in this Lease and/or to sublet or license all or any portion of the
- 2 Premises: (a) to an Affiliate of Tenant; (b) to any entity which purchases all or substantially all
- 3 of the assets of Tenant or any of its Affiliates; (c) to any entity which purchases Tenant's
- 4 interest in the majority of stores owned or operated by Tenant or its Affiliate(s) in the State of
- 5 California; (d) in conjunction with any merger, acquisition, consolidation or public offering of
- 6 stock or other interests involving Tenant or its Affiliate(s); and/or (e) as may be required by any
- 7 Legal Requirement.

8 Section 15.2 <u>Liability of Tenant</u>. Unless otherwise agreed to in writing by

9 Landlord, no assignment, subletting, licensing or concessioning by Tenant shall reduce,

- 10 diminish, or otherwise affect the liability of Tenant hereunder; provided, however, that in the 11 event of an assignment by the Tenant originally named herein or its Affiliate (collectively, the
- 12 "Original Tenant") of its interest in this Lease to a Major Assignee or to a tenant whose
- 13
- obligations under this Lease are guaranteed by a Major Guarantor, all liability of the Original 14 Tenant under this Lease accruing from and after the effective date of such assignment, shall
- 15 terminate. For purposes of this Section 15.2, the term "Major Assignee" or "Major
- 16 Guarantor", as the case may be, shall mean a person or entity which has, as of the effective date
- 17 of such assignment, a tangible net worth of at least Seventy Five Million (\$75,000,000) Dollars.
- 18 Section 15.3 Collateral Assignment. In addition to Tenant's other rights set
- 19 forth in this Article 15, a collateral assignment of Tenant's interest in this Lease by Tenant to one
- 20 or more "Lenders" (hereinafter defined), as collateral security for an indebtedness or other 21 obligation of Tenant or its Affiliates shall be permitted and Landlord shall execute all
- 22 documentation reasonably requested by Tenant or any such Lender in connection therewith,
- 23 provided that such collateral assignment complies with all of the terms of this Lease including,
- 24 without limitation, the Permitted Use set forth in Section 1.1.25 hereof. In addition, Tenant shall
- 25 have the right, without Landlord's consent, to grant to an Affiliate of Tenant a license to operate
- 26 all of Tenant's business operations at the Premises, without such Affiliate having assumed any
- 27 liability for the performance of Tenant's obligations under this Lease. As used herein, "Lender"
- 28 shall mean a state or federally regulated: bank, savings and loan association, insurance company,
- 29 pension fund, credit union, real estate investment trust, or other institutional lender.
- 30 Notwithstanding anything contained in this Section 15.3 to the contrary, in no event shall
- 31 Landlord's interest in the Shopping Center or the interest of a Mortgagee be subordinate to any
- 32 interest of any Tenant Lender.

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33 Section 15.4 Cure Rights of Original Tenant.

15.4.1 Unless Tenant is then released from liability pursuant to Section 15.2 above, if Tenant assigns Tenant's interest in this Lease, then Landlord, when giving notice to said assignee or any future assignee in respect of any default, shall also give a copy of such notice to the Original Tenant, and no notice of default shall be effective until a copy thereof is so given to Original Tenant. Original Tenant shall have the same period after receipt of such notice to cure such default as is given to Tenant therefor under this Lease.

15.4.2 If this Lease is terminated because of: (a) an Event of Default of such assignee, or (b) the rejection, disaffirmation, or other termination of this Lease by or on behalf of the assignee pursuant to any proceeding in bankruptcy under any Legal Requirement of any State or of the United States, or any other Legal Requirements affecting creditors' rights, then Landlord shall promptly give to Original Tenant notice thereof, and Original Tenant shall have the right, exercisable by notice given to Landlord within fifteen (15) days after receipt by Original Tenant of Landlord's notice, to enter into a new lease of the Premises with Landlord ("New Lease"), provided that the Original Tenant shall have remedied all Events of Default of the assignee hereunder, unless such Events of Default are personal to the assignee and/or not reasonably susceptible of cure by the Original Tenant, in which event the Original Tenant shall not be obligated to cure such Events of Default as a condition to the exercise of its rights under this Subsection 15.4.2. Upon the Original Tenant's curing of any such Event of Default of the assignee as aforesaid, Landlord shall assign to the Original Tenant all of Landlord's rights against such assignee (whether arising as a result of bankruptcy court proceedings or otherwise). The term of said New Lease shall begin on the date of termination of this Lease and shall continue for the remainder of the Term (including any Renewal Periods). Such New Lease shall otherwise contain the same terms and conditions as those set forth herein, except for requirements which are no longer applicable or have already been performed. It is the intention of the parties hereto that such New Lease shall have the same priority relative to other rights or

- interests in or to the Premises as this Lease. The provisions of this Subsection 15.4.2 shall 2 survive the termination of this Lease and shall continue in full force and effect thereafter to the 3 same extent as if this Subsection 15.4.2 were a separate and independent contract between 4 Landlord and the Original Tenant. From the date on which the Original Tenant shall serve 5 Landlord with the aforesaid notice of the exercise of its right to a New Lease, the Original Tenant shall have quiet and undisturbed use and enjoyment of the Premises and all 6 7 appurtenances thereto, as contemplated in this Lease. 8 Section 15.5 Recognition Agreement. In the event Tenant subleases all or any 9 portion of the Premises to an Affiliate, or to a third party for a term of at least five (5) years and 10 which sublease otherwise satisfies the requirements of Section 8.1.3 hereof, then, notwithstanding any other provisions of this Lease, Landlord shall, upon Tenant's request, 11 12 execute and deliver an agreement among Landlord, Tenant and each such subtenant in the form 13 of Exhibit H hereto, in recordable form. 14 ARTICLE 16 15 DEFAULT AND DISPUTE RESOLUTION 16 Section 16.1 Tenant Default. 17 16.1.1 (i) If Tenant shall fail to pay any Rent when due, within ten (10) days after 18 its receipt of notice thereof from Landlord specifying the amount and details of the unpaid Rent, 19 or (ii) if Tenant shall fail to perform or observe any of the other covenants of this Lease on 20 Tenant's part to be performed or observed within thirty (30) days after its receipt of notice 21 thereof from Landlord specifying the nature of such default (or, if such default shall be of a 22 nature that same cannot reasonably be cured within thirty (30) days and Tenant does not 23 commence to cure such default on or before such thirtieth (30th) day and thereafter diligently prosecute said cure to completion), or (iii) if Tenant shall (x) file or acquiesce to a petition in any 24 25 court in any bankruptcy, reorganization, composition, extension, arrangement or insolvency 26 proceedings, (y) make an application in any such proceedings for or acquiesce to the 27 appointment of a trustee or receiver for it or for all or any portion of its property or (z) make an assignment for the benefit of creditors in connection with any of the proceedings specified in (x) 28 29 or (y) above, or (iv) if any petition shall be filed against Tenant to which Tenant shall not 30 acquiesce in any court in any bankruptcy, reorganization, composition, extension, arrangement 31 or insolvency proceedings, and (a) Tenant shall thereafter be adjudicated a bankrupt, (b) such petition shall be approved by any such court, or (c) such proceedings shall not be dismissed, 32 discontinued or vacated within 120 days, or (v) if, in any proceeding, pursuant to the application 33 34 of any person other than Tenant, to which Tenant does not acquiesce, a receiver or trustee shall 35 be appointed for Tenant, for all or any portion of the property of Tenant and such receivership or 36 trusteeship shall not be set aside within 120 days after such appointment, any of the foregoing 37 circumstances, after the expiration of any applicable notice and cure period, shall constitute an 38 "Event of Default". 39 16.1.2 Upon an Event of Default, Landlord shall have all remedies given to it at 40 law or in equity (except that Landlord hereby expressly waives any rights to accelerate any element of the Rent, and any right of distraint, which may be granted to it by law), including the 41 42 following: to bring suit for the collection of such unpaid Rent or for the 43 performance of such other covenant of this Lease on Tenant's part to be performed; and/or 44 45 without waiving any non-monetary default, may (but shall not be obligated to) perform any covenant which is capable of being remedied by the performance of 46 affirmative acts for the account and at the reasonable expense of Tenant (it being agreed that 47 should Landlord require access to the Premises in order to perform such covenant as aforesaid, 48 Landlord shall comply with the applicable provisions of Sections 9.2 hereof), in which event, 49 50 Tenant shall pay to Landlord on demand, as Additional Rent, the reasonable cost or amount thereof, together with interest thereon at the Lease Interest Rate from the date of outlay of 51 52 expense until payment; and/or
 - (c) upon at least five (5) days' notice to Tenant, to terminate this Lease, whereupon Landlord shall have and retain full right to sue for and collect all unpaid Rent which shall have accrued up to the date of termination and any damages to Landlord by reason of

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- any such breach as provided in Section 16.1.3 below, and Tenant shall surrender and deliver the
- 2 Premises to Landlord, failing which, Landlord shall have the right to initiate summary
- 3 proceedings to recover possession; and/or
- (d) upon at least five (5) days' notice to Tenant to terminate Tenant's right of possession, re-enter the Premises and take possession thereof by lawful means. If Landlord shall so elect to repossess the Premises without terminating the Lease, then Tenant shall be liable for and shall pay to Landlord all Rent payable to Landlord pursuant to the terms of this Lease which shall have accrued up to the date of repossession, as well as all Rent as and
- 9 when same shall become due and payable pursuant to the terms of this Lease during the 10 remainder of the Term, diminished by any net sums thereafter received by Landlord through
- reletting the Premises during said period (after deducting reasonable expenses incurred by
- Landlord in connection with such reletting). In no event shall Tenant be entitled to any excess of
- 12 Landford in connection with such reletting). In no event snall Tenant be entitled to any excess of any rent obtained by such reletting over and above the Rent herein reserved. Landlord may bring
- 14 actions to collect amounts due by Tenant under this Lease, from time to time, prior to the
- 15 expiration of the Term.

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- 16.1.3 Upon an Event of Default, Tenant shall be liable for and shall pay to Landlord, in addition to any sum provided to be paid above, brokers' fees incurred by Landlord in connection with reletting the whole or any part of the Premises for the remainder of the then unexpired Term (excluding any then unexercised Renewal Periods), the costs of removing and storing Tenant's or other occupant's property; the cost of repairs; and all other commercially reasonable expenses incurred by Landlord in enforcing or defending Landlord's rights and/or remedies, including reasonable attorneys' fees.
- 16.1.4 Upon an Event of Default, any amounts paid by Landlord to cure said Event of Default and any Rent payments not paid after notice thereof is given shall bear interest at the Lease Interest Rate from and after the expiration of any applicable grace period until paid.
- 16.1.5 Landlord shall use all reasonable efforts to relet the Premises or any portion thereof to mitigate Landlord's damages to which Landlord would otherwise be entitled to as a result of an Event of Default; provided, however, that if there are other vacancies in the Shopping Center at that time or in other shopping centers owned by Landlord or an Affiliate within the Daly City, California metropolitan area, Landlord may give preference to reletting the other vacant spaces. In no event shall Tenant be liable to Landlord for any consequential damages suffered by Landlord as a result of an Event of Default by, or any other act of, Tenant.
- Section 16.2 <u>Landlord Default</u>. If Landlord shall: (i) fail to perform or observe any of the covenants of this Lease on Landlord's part to be performed or observed within thirty (30) days after receiving notice from Tenant thereof (or, if same cannot reasonably be cured within thirty (30) days, if Landlord shall fail to promptly commence and diligently prosecute said cure to completion), or (ii) materially breach any warranty or representation under this Lease (either of (i) or (ii) above being hereinafter referred to as a "*Landlord's Default'*"), then Tenant, in addition to such other rights and remedies as may be available under this Lease, or at law or in equity, may, in its sole discretion:
- (a) as applicable, perform such obligation(s) that are Landlord's express responsibility in this Lease and in accordance with the provisions of this Lease on behalf of, and at the expense of Landlord, provided Tenant's right to perform such obligations of Landlord shall be limited to the Premises, the Critical Area, Tenant's loading facility (including, without limitation, Tenant's trash container and/or compactor) and the sidewalk in front of Tenant's Premises; and/or
- 47 (b) bring suit for the collection of any amounts for which Landlord is 48 in default, seek injunctive relief, or seek specific performance for any other covenant or 49 agreement of Landlord, without terminating this Lease; and/or
- 50 (c) offset against the Rent payable by Tenant hereunder for amounts 51 owed by Landlord to Tenant and/or for the amounts reasonably expended by Tenant performing 52 Landlord's obligations hereunder, including costs and reasonable attorneys' fees, together with 53 interest thereon at the Lease Interest Rate from the date of the outlay until paid; and/or

(d) terminate this Lease, without waiving its rights to damages for Landlord's Default, <u>provided</u> that: (1) Landlord's Default materially interferes with the normal conduct of any business operations in the Premises, (2) Landlord's Default is not reasonably capable of being cured by Tenant, and (3) Tenant gives notice of Landlord's Default to any Mortgagee of whom Landlord shall have previously given Tenant notice (including its address), and such Mortgagee shall not have cured Landlord's Default within thirty (30) days after such notice is given (or, if such default cannot reasonably be cured within thirty (30) days, such Mortgagee fails to promptly commence and diligently prosecute said cure to completion).

Notwithstanding the foregoing, if, in Tenant's reasonable judgment, a condition posing imminent risk of liability or material harm to persons or property or material disruption to the normal conduct of any business operations in the Premises shall exist which is Landlord's responsibility to repair, Tenant may, at its election, and with reasonable prior notice to Landlord, exercise any or all of the remedies set forth in (a), (b) and (c) above. In no event shall Landlord be liable to Tenant for any consequential damages suffered by Tenant as a result of a default by, or any other act of, Landlord.

Section 16.3 <u>Arbitration</u>. In any case where this Lease expressly provides for submission of a dispute or matter to arbitration (but not otherwise), the same shall be settled by arbitration in Daly City, California, before one arbitrator in accordance with the procedural rules of the American Arbitration Association (or any successor thereto) then in effect. The decision of the arbitrator shall be final, conclusive and binding on the parties, but the powers of the arbitrator are hereby expressly limited to the determination of factual issues, and the arbitrator shall have no power to reform, supplement or modify this Lease. The arbitrator shall make only required findings of fact incident to an arbitrable dispute, which findings shall be set forth in reasonable detail in a written decision by the arbitrator. Landlord and Tenant shall share equally in the cost and expenses of such arbitration, and each shall separately pay its own attorneys' fees and expenses, unless the arbitrator finds that one of the parties did not act in good faith in connection with the dispute or the conduct of the arbitration proceeding, in which case the arbitrator may award all or part of said costs, expenses and fees to the other party.

ARTICLE 17 RIGHT TO MORTGAGE AND NON-DISTURBANCE; ESTOPPEL CERTIFICATE

Section 17.1 Right to Mortgage and Non-Disturbance. Landlord reserves the right to subject and subordinate this Lease at all times to the lien of any first mortgage or deed of trust for the benefit of any Mortgagee hereafter encumbering or affecting all or any portion of the Shopping Center, as well as to any future ground or underlying leases encumbering or affecting all or any part of the Shopping Center; provided, however, that (a) each Mortgagee shall first execute and deliver to Tenant a subordination, non-disturbance and attornment agreement in substantially the form attached as Exhibit G hereto, in recordable form, and (b) any Ground Lessor shall execute (and shall obtain the written consent of any holder of any mortgage, deed of trust or any other existing lien encumbering or affecting the Shopping Center or any portion thereof, as applicable) and deliver to Tenant a fee owner recognition agreement in a form reasonably satisfactory to Tenant, which shall include the following provisions: (i) the Ground Lessor will not, in the exercise of any of the rights arising or which may arise out of such lease, disturb or deprive Tenant in or of its possession or its rights to possession of the Premises or of any right or privilege granted to or inuring to the benefit of Tenant under this Lease; (ii) in the event of the termination of the ground or underlying lease, Tenant will not be made a party in any removal or eviction action or proceeding, nor shall Tenant be evicted or removed of its possession or its right of possession of the Premises, and this Lease shall continue in full force and effect as a direct lease between the Ground Lessor and Tenant for the remainder of the Term and on the same terms and conditions as contained herein, without the necessity of executing a new lease; and (iii) Landlord and Tenant shall have the right to execute any amendment to this Lease which is specifically required hereunder and the Ground Lessor shall recognize and be bound thereto.

Section 17.2 <u>Estoppel Certificate</u>. Upon written request of Landlord or Tenant, the other party, within thirty (30) days after the date of receipt of such request, shall execute and deliver to and only for the benefit of the requesting party or any Mortgagee, *bona fide* prospective purchaser, assignee, or sublessee of the requesting party, without charge, a written statement: (1) ratifying this Lease; (2) certifying, to such party's actual knowledge, that this Lease is in full force and effect, if such is the case, and has not been modified, assigned,

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supplemented or amended, except by such writings as shall be stated; (3) specifying the dates to 2 which Fixed Rent and Additional Rent have been paid; (4) stating whether or not, to such party's 3 actual knowledge, the party requesting the estoppel is in default and, if so, stating the nature of 4 such default, (5) stating the Rent Commencement Date, and (6) stating which options to extend 5 the Lease Term have been exercised, if any. 6 Section 17.3 Mortgages and Ground Leases. Landlord represents and warrants 7 to Tenant that no mortgage, deed of trust, security instrument or ground or underlying lease 8 encumbers the Shopping Center or any portion thereof as of the Effective Date. 9 ARTICLE 18 10 NOTICE 11 Subject to the further provisions of this Article 18, whenever it is provided herein that 12 any notice, demand, request, consent, approval or other communication ("Notice") shall or may 13 be given to either of the parties by the other, it shall be in writing and, any Legal Requirement to 14 the contrary notwithstanding, shall not be effective for any purpose unless same shall be given by 15 registered or certified mail, postage prepaid, return receipt requested, or by any recognized 16 overnight mail carrier, with proof of delivery slip, addressed to Landlord at Landlord's Mailing 17 Address, with copies of notices to Landlord also given to: Equity One Realty & Management 18 CA, Inc., 410 Park Avenue, Suite 1220, New York, New York 10022, Attn: Property 19 Management or to Tenant at Tenant's Mailing Address, with copies of notices to Tenant also 20 given to: (i) Allan N. Rauch, Esq., c/o Bed Bath & Beyond Inc., 650 Liberty Avenue, Union, New Jersey 07083, and (ii) Jeffrey H. Kaplan, Esq., c/o Bryan Cave LLP, 1290 Avenue of the 21 22 Americas, New York, New York 10104, or to such other person or other address as may, from 23 time to time, be specified by either party in a written notice to the other party. If Landlord shall consist of more than one person or entity, notices delivered by Tenant to Landlord's Mailing 24 25 Address shall be deemed to be delivered to, and effective notice to, all such persons or entities 26 comprising Landlord. All notices given in accordance with the provisions of this Section shall 27 be effective upon receipt (or refusal of receipt) at the address of the addressee, provided, 28 however, that if a deadline for the giving of any notice under this Lease occurs on Saturday, 29 Sunday, or a legal holiday, then such deadline shall be extended to the next business day 30 thereafter occurring. Notwithstanding the foregoing, Landlord shall instead send the following items to Tenant (Attention: Lease Administration) at Tenant's Mailing Address: all bills, notices 31 32 (but not notices of default) and related information pertaining to Tenant's Fixed Share of 33 Common Areas Charges as described in Section 5.1.2 of this Lease. 34 ARTICLE 19 35 TENANT'S PROPERTY All of Tenant's Property which may be installed or placed in or upon the Premises by 36 37 Tenant shall remain the property of Tenant. Tenant may assign, hypothecate, encumber, mortgage or create a security interest in or upon Tenant's Property in the Premises without the 38 39 consent of Landlord and may remove Tenant's Property at any time during the Term. Landlord waives any right it may have in Tenant's Property. To the extent Landlord may have a lien on or 40 41 security interest in the Tenant's Property pursuant to this Lease, by law or otherwise, Landlord hereby waives, and agrees not to assert, such lien or security interest. Landlord shall provide to 42 43 Tenant, within ten (10) days after Tenant's request therefor, a written waiver in form reasonably satisfactory to Landlord and Tenant evidencing Landlord's waiver of any rights it has or may 44 45 have in Tenant's Property. 46 ARTICLE 20 47 END OF TERM Section 20.1 Surrender of Premises. At the expiration of the Term, Tenant will 48 quit and surrender the Premises in good condition and repair, excepting, however, reasonable 49 wear and tear, damage by fire or other casualty, damage by eminent domain, and repairs and 50 replacements to be made by Landlord hereunder. 51

percent (100%) of the monthly Fixed Rent payable by Tenant immediately prior to the end of the
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Landlord at the end of the Term, Tenant shall be a tenant at sufferance and shall be liable for

Holdover Rent. As used herein, "Holdover Rent" shall be an amount equal to (i) one hundred

Section 20.2 Hold Over. If Tenant fails to deliver possession of the Premises to

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1 2 3 4 5 6 7 8 9 10 11 12	Term for any month or portion thereof (with no proration for the actual number of days that Tenant holdsover) during which Tenant fails to deliver possession of the Premises to Landlord at the end of the Term and (ii) fifty percent (50%) of the amount payable pursuant to clause (i) above and (iii) one hundred fifty percent (150%) of all Additional Rent, except the amounts payable in clauses (ii) and (iii) shall be prorated based upon the number of days in the applicable month that Tenant has failed to deliver possession of the Premises to Landlord. By way of illustration, if the monthly Fixed Rent at the end of the Term is \$15,000, Tenant would owe Landlord such amount on a monthly basis, regardless of the number of days in such month that Tenant has failed to deliver possession of the Premises to Landlord, and in addition, Tenant would owe Landlord \$7,500 and all Additional Rent then due for such month but the amount of \$7,500 and the Additional Rent would be prorated on a daily basis depending upon when Tenant delivers possession of the Premises to Landlord.
13 14	ARTICLE 21 [INTENTIONALLY DELETED]
15 16	ARTICLE 22 ONGOING CO-TENANCY
17 118 19 20 21 22 22 22 24 225 226 227 228 229 330 331 332 333 334 335 336 337	If (i) two (2) of the Anchor Tenants (as defined in Section 2.5.1) are not open for business or (ii) less than sixty five percent (65%) of the Floor Area of the Shopping Center (excluding the Floor Area of the Premises, any other space occupied by Tenant or any of its Affiliates, the Anchor Tenants and any new expansion areas not built as of the Effective Date) is open and operating by tenants typically found in similar shopping centers in California and such condition continues for a period of more than three (3) consecutive months (such condition being hereinafter referred to as an "Ongoing Excess Vacancy"), then in such event, Tenant shall have the right to pay Alternate Rent in lieu of Fixed Rent during the period of such Excess Vacancy, and/or if the Excess Vacancy continues for a period in excess of twelve (12) continuous months, to terminate this Lease, exercisable by giving Landlord, within one hundred twenty (120) days after the expiration of such 12-month period, at least sixty (60) days' prior notice, in which event this Lease shall terminate on the date set forth in Tenant's notice of termination without further liability accruing after the date of such termination on the part of either Landlord or Tenant. If Tenant does not terminate this Lease pursuant to this Article 22, then commencing on the expiration of the aforesaid 120-day period, Tenant shall resume paying full Rent without regard to the foregoing provisions of this Article 22, provided, however, that Tenant shall retain all of its rights under this Article 22 with respect to any future condition of Ongoing Excess Vacancy thereafter occurring. Notwithstanding the foregoing, if Tenant ceases to operate any business in the Premises and such cessation occurs more than one year before the Excess Vacancy occurs, then Tenant shall not have the right to pay Alternate Rent but Tenant shall still retain its termination right pursuant to terms of this Article 22.
38 39	ARTICLE 23 MISCELLANEOUS
40 41 42	Section 23.1 <u>Loading Facilities</u> . Tenant shall have the exclusive right to utilize the loading facilities serving the Premises (shown on <u>Exhibit B</u>) on a "24 hour a day", "365 days a year" basis.
43 44 45 46 47 48 49 50 51	Section 23.2 <u>Liens</u> . Within thirty (30) days after notice of the filing thereof, Tenant shall discharge (either by payment or by filing of the necessary bond, or otherwise) any lien against the Premises and/or Landlord's interest therein, which may arise out of any payment due for, or purported to be due for, any labor, services, materials, supplies or equipment alleged to have been furnished to or for Tenant in, upon or about the Premises. Similarly, within thirty (30) days after notice of the filing thereof, Landlord shall discharge (either by payment or by filing of the necessary bond, or otherwise) any lien against the Premises and/or Landlord's interest therein, which may arise out of any payment due for, or purported to be due for, any labor, services, materials, supplies or equipment alleged to have been furnished to or for Landlord in, upon or about the Premises.
53 54 55 56	Section 23.3 <u>Broker's Commission</u> . Landlord and Tenant each warrant and represent to the other that they did not deal with any real estate broker in connection with the negotiation, execution and delivery of this Lease, except for Terranomics (the <i>Broker''</i>). Landlord shall pay the Broker a commission pursuant to a separate agreement. Each party agrees

to indemnify, defend, and save the other harmless from and against any and all liabilities, costs, 2 causes of action, damages and expenses, including, without limitation, attorneys' fees, with 3 respect to or arising out of any claims made by any real estate broker (other than the Broker), 4 agent or finder with respect to this Lease in breach of the foregoing representation. The provisions of this Section shall survive the expiration or earlier termination of this Lease.

Section 23.4 Force Majeure. Except as otherwise expressly set forth herein, in the event either party hereto shall be delayed or hindered in, or prevented from, the performance of any act required hereunder by reason of strikes, failure of power, riots, insurrection, war, earthquake, hurricane or tornado (or comparable weather conditions of unusual severity), or other reasons of an extraordinary nature which are beyond the reasonable control of the party, and which could not have been avoided through the exercise of due diligence by a party (collectively referred to herein as "Force Majeure"), then the performance of any such act shall be excused for a period equal to the period of the delay. Notwithstanding the foregoing provisions, the following shall not constitute Force Majeure: (i) the financial inability of a party to perform its obligations under this Lease; or (ii) delays occurring in the course of complying with applicable Legal Requirements that could have been avoided through the exercise of due diligence by a party hereto. A party wishing to invoke this Section shall give the other party notice of that intention within ten (10) days of the commencement of any event of Force Majeure and shall, at that time, specify the reasons therefor, the specific provision of this Lease which will be delayed as a result, and the period of such extension, if known, or if not known, a reasonable estimate thereof.

Section 23.5 Consents. Except as may be otherwise expressly set forth in this Lease, whenever under this Lease provision is made for either party's securing the consent or approval of the other party, (i) such consent or approval shall be in writing and shall not be unreasonably withheld, delayed or conditioned, and (ii) in all matters contained herein, both parties shall have an implied obligation of reasonableness.

Section 23.6 Costs. Whenever this Lease requires the performance of an act by a party, such party shall perform the act at its own cost and expense, unless expressly provided to the contrary.

Section 23.7 Attorneys' Fees. In any action or proceeding hereunder (whether to enforce the terms and provisions of an indemnity or otherwise), the prevailing party shall be entitled to recover from the other party the prevailing party's reasonable costs and expenses in such action or proceeding, including reasonable attorneys' fees, costs and expenses. Except as otherwise set forth herein, if either party is sued by a third party as a result of a violation of a covenant or warranty herein contained by the other party hereto, then the party who has violated the covenant or warranty shall be responsible for the reasonable costs and expenses in such action or proceeding against the non-violating party, including reasonable attorneys' fees, costs and expenses.

Section 23.8 Survival of Obligations. The obligation to pay any sums due to either party from the other that by the terms herein would not be payable, or are incapable of calculation, until after the expiration or sooner termination of this Lease shall survive and remain a continuing obligation until paid. All indemnity obligations under this Lease shall survive the expiration or earlier termination of this Lease.

Section 23.9 Non-Waiver. The failure of Landlord or Tenant to insist upon the strict performance of, or to enforce, any provision, covenant or condition herein shall not be deemed to be a waiver thereof, nor void or affect the right of the aggrieved party to enforce the same covenant or condition on the occasion of any subsequent breach or default; nor shall the failure of either party to exercise any option in this Lease upon any occasion arising therefor be deemed or construed to be a waiver of the right to exercise that same kind of option upon any subsequent occasion.

Section 23.10 Rights Cumulative. Unless expressly provided to the contrary in this Lease, each and every one of the rights, remedies and benefits provided by this Lease shall be cumulative and shall not be exclusive of any other such rights, remedies and benefits allowed by applicable Legal Requirements.

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Section 23.11 <u>Definition of Landlord</u>. The term "Landlord" shall mean only the person or entity which, from time to time, shall then own the Shopping Center, and in the event of the transfer by such owner of its interest in the Shopping Center, such owner shall (except to the extent of (1) claims made by Tenant against Landlord which arose prior to the effective date of the transfer of such ownership interest, and/or (2) judgments obtained by Tenant against Landlord, on or prior to the effective date of the transfer of such ownership interest) thereupon be released and discharged from all covenants and obligations of Landlord thereafter accruing, but such covenants and obligations shall be binding during the Term upon each new owner for the duration of such owner's ownership.

Section 23.12 <u>Successors and Assigns</u>. The provisions of this Lease shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

Section 23.13 <u>Limitation of Landlord's Liability</u>. Except with respect to the payment of the Tenant Allowance and insurance proceeds or condemnation awards received by Landlord which are required by the terms of this Lease to be applied to the repair or restoration of the Premises or the Shopping Center, Tenant shall, on and after the Delivery Date, look only to Landlord's estate and property in the Shopping Center (or the proceeds from the sale of all or any portion thereof) and net income derived from the Shopping Center for the satisfaction of Tenant's remedies for the collection of a judgment (or other judicial process) requiring the payment of money by Landlord hereunder and no other property or assets of Landlord, its officers, directors, stockholders, members or partners shall be subject to levy, execution or other enforcement procedure for the satisfaction of Tenant's remedies under or with respect to this Lease. Except with respect to the limitation on personal liability hereinabove set forth, the provisions of this Section 23.13 shall not be deemed or construed to limit Tenant's rights and remedies pursuant to this Lease or which may be available at law or in equity.

Section 23.14 <u>Limitation of Tenant's Liability</u>. Landlord, its successors and assigns, shall look solely to the assets, if any, of Tenant and its successors and assigns, for the satisfaction of any claim arising from or under this Lease and shall not seek to impose personal liability on any shareholder, officer, director, member or employee of Tenant or any of its Affiliates.

Section 23.15 <u>Joint and Several Liability</u>. If either party consists of more than one person, then the persons constituting such party shall be jointly and severally liable hereunder.

Section 23.16 <u>Severability</u>. If any term, covenant, condition or provision of this Lease is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

Section 23.17 <u>Grammatical Usages and Construction</u>. In construing this Lease, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context so requires. This Lease shall be construed without regard to: (i) the identity of the party who drafted the various provisions hereof, and (ii) the addition or deletion of text made during the negotiation of this Lease. Moreover, each and every provision of this Lease shall be construed as though all parties hereto participated equally in the drafting thereof. As a result of the foregoing, any rule or construction that a document is to be construed against the drafting party shall not be applicable hereto.

Section 23.18 <u>Table of Contents, Line Numbering and Paragraph Headings</u>. The table of contents and line numbering, if any, and section headings are inserted only for convenience and in no way define, limit or describe the scope or intent of this Lease, nor in any way affect this Lease.

Section 23.19 <u>Definition of Hereunder, Herein, etc.</u>. Unless the context clearly indicates to the contrary, the words "herein," "hereof," "hereunder," "hereafter," and words of similar import refer to this Lease and all the Exhibits attached hereto as a whole and not to any particular section, subsection, or paragraph hereof.

Section 23.20 Short Form Lease. Upon the request of either party following the execution and delivery of this Lease, Landlord and Tenant shall execute a short form lease or memorandum, which shall be in recordable form, and in such form and having such substance as either party shall reasonably request. Landlord and Tenant shall cooperate with each other in effecting the recordation thereof. In no event shall the amount of Fixed Rent reserved hereunder be included in any such short form lease or memorandum.

Section 23.21 Entire Agreement and Modification. This Lease constitutes the entire agreement of the parties hereto, and all prior agreements between the parties, whether written or oral, are merged herein and, except as may be specifically set forth herein, shall be of no force and effect. This Lease cannot be changed, modified or discharged orally, but only by an agreement in writing, signed by the party against whom enforcement of the change, modification or discharge is sought.

Section 23.22 <u>No Joint Venture or Partnership Created by Lease</u>. Nothing contained herein shall be deemed or construed as creating the relationship of principal and agent or of partnership or of joint venture between the parties hereto.

Section 23.23 <u>Tenant's Tradename</u>. Except as a nominative fair use (e.g. to show the location of the Premises in the Shopping Center, to indicate that Tenant is a tenant in the Shopping Center, to announce the "Grand Opening" and "Coming Soon" of Tenant and the listing of Tenant's name on site plans, promotional materials and internet shopping center directories), Landlord shall not make use of the tradenames "Bed Bath & Beyond"® or "Buy Buy Baby"® in any advertising or marketing material, including, without limitation, on any internet website, without obtaining Tenant's prior written approval, which may be withheld in Tenant's sole and absolute discretion.

Section 23.24 <u>Counterparts</u>. This instrument may be executed in several counterparts, each of which shall be deemed an original. The signatures to this instrument may be executed and notarized on separate pages, and when attached to this instrument, shall constitute one complete document.

Section 23.25 <u>Waiver of Trial by Jury</u>. Landlord and Tenant hereby mutually waive any and all rights which either may have to request a jury trial in any proceeding between them at law or in equity.

Section 23.26 Ethical Conduct Policy. It is the policy of Tenant and its subsidiaries and affiliates (collectively, "the Company") to conduct all its business transactions in accordance with the highest ethical standards and all applicable laws (including, but not limited to, the U.S. Foreign Corrupt Practices Act). No individual who is employed by or who represents the Company, and no individual or entity that contracts with the Company or otherwise performs services on behalf of the Company, is permitted to solicit, accept, offer, promise or pay any bribe, kickback or any other improper payment of money, products or services. This includes, but is not limited to, any improper payment in exchange for (i) the Company's execution of this Lease, (ii) any action taken by such individual on behalf of the Company, or (iii) any action taken by a third party. Any individual or entity having a business relationship with the Company shall require any subcontractor (of any level) to adhere to the same standards and are expected to appropriately monitor their subcontractors to ensure such adherence. If any such improper actions are observed, please contact the Tenant's Legal Department (Attention: General Counsel) at 908-688-0888 so that the incident may be fully investigated and appropriate remedial action taken.

Section 23.27 <u>Confidentiality</u>. Landlord shall not reveal to anyone, or otherwise make or publish any public statement or notice regarding the economic or other business terms of this Lease (including, without limitation, the Term and the Rent), except as required by Legal Requirements or for disclosure to Landlord's accountants, attorneys, bona fide prospective purchasers, or current or prospective Mortgagees or underlying lessors of all or any portion of Landlord's interest in the Shopping Center, provided that each of such recipients shall be bound to the same non-disclosure provisions as are imposed upon Landlord. Tenant shall not reveal to anyone, or otherwise make or publish any public statement or notice regarding the economic or other business terms of this Lease (including, without limitation, the Term and the Rent), except as required by Legal Requirements or for disclosure to Tenant's accountants, attorneys, bona fide prospective purchasers, assignees or sublessees, provided that each of such recipients shall be

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 56 of 64

- bound to the same non-disclosure provisions as are imposed upon Tenant and except the
- 2 foregoing shall not prohibit Tenant from recording a memorandum of this Lease and for
- 3 Landlord, Tenant and Tenant's subtenant entering into a Subtenant Recognition Agreement in
- 4 the form of Exhibit H attached hereto.

Section 23.28 <u>Timely Billing of Charges</u>. Except if the reason for the delay in billing is outside of Landlord's control, all charges due from Tenant to Landlord for which Tenant must be billed by Landlord must be billed within three (3) years after the close of the calendar year in which the charge is incurred by, or otherwise payable to, Landlord or Landlord will have waived its right to reimbursement which may have been established in any section of this Lease.

Section 23.29 <u>USA Patriot Act</u>. Pursuant to *Executive Order 13224*, signed by President George W. Bush on September 24, 2001, Landlord and Tenant hereby certify to each other that: (i) it is not acting, directly or indirectly, for or on behalf of any person, group, entity, or nation named by any Executive Order or the United States Treasury Department as a terrorist, "Specially Designated National and Blocked Person," or other banned or blocked person, entity, nation, or transaction pursuant to any law, order, rule, or regulation that is enforced or administered by the Office of Foreign Assets Control; and (ii) it is not engaged in this transaction, directly or indirectly on behalf of, or instigating or facilitating this transaction directly or indirectly on behalf of, any such person, group, entity, or nation. Landlord and Tenant hereby agree to defend, indemnify and hold harmless the other from and against any and all claims, damages, losses, risks, liabilities and expenses (including reasonable attorneys' fees and costs) arising from or related to any breach of the foregoing certification. Notwithstanding anything to the contrary contained herein, the parties recognize that Landlord and Tenant's parent company are both publicly traded companies with multiple shareholders, many of whose identities are unknown to each of them.

Section 23.30 <u>CASP Inspection Civil Code Section 1938</u>. The Premises has not undergone inspection by a Certified Access Specialist (CASp). The foregoing verification is included herein solely for the purpose of complying with California Civil Code Section 1938 and shall not in any manner affect the parties' respective responsibilities for compliance with

construction-related accessibility standards as provided under this Lease.

[Signature page follows]

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 57 of 64

1 Section 23.31 Governing Law. This Lease shall be governed by, construed, and 2 enforced in accordance with the laws of the State in which the Premises are located. 3 IN WITNESS WHEREOF, the parties have executed this instrument under seal the day 4 and year first-above written. 5 LANDLORD: DALY CITY SERRAMONTE CENTER, WITNESS: LLC, a Delaware limited liability company By: Equity One Realty & Management CA, Inc. Name: Michael Makinen Title: Chief Operating Officer **TENANT:** WITNESS: BED BATH & BEYOND INC., a New York corporation Name: Warren Eisenberg Name: Alan M. Freeman Title: Assistant Secretary Title: Co-Chairman

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 58 of 64

1		INDEX OF EXHIBITS
2	Exhibit A -	Legal Description of Shopping Center
3	Exhibit B -	Site Plan
4	Exhibit C -	Form of Rent Commencement and Expiration Date Agreement
5	Exhibit D -	Specifications for Landlord's Work
6	Exhibit D-1	Exterior Elevations of the Premises, and Sidewalk Plan
7	Exhibit E -	Permitted Encumbrances
8	Exhibit F -	Signage
9	Exhibit G -	Form of Subordination, Non-Disturbance and Attornment Agreement
10	Exhibit H -	Form of Subtenant Recognition Agreement
11	Exhibit I -	Form of Delivery Date Notice
12	Exhibit J -	Form of Delivery Date Certification
13	Exhibit K-1	Existing Exclusives
14	Exhibit K-2	Existing Leases
15	Exhibit L	Prohibited Uses
16	Exhibit M	Form of Mechanics' Lien Indemnification Agreement
17	Exhibit N	Existing Lease Limitations

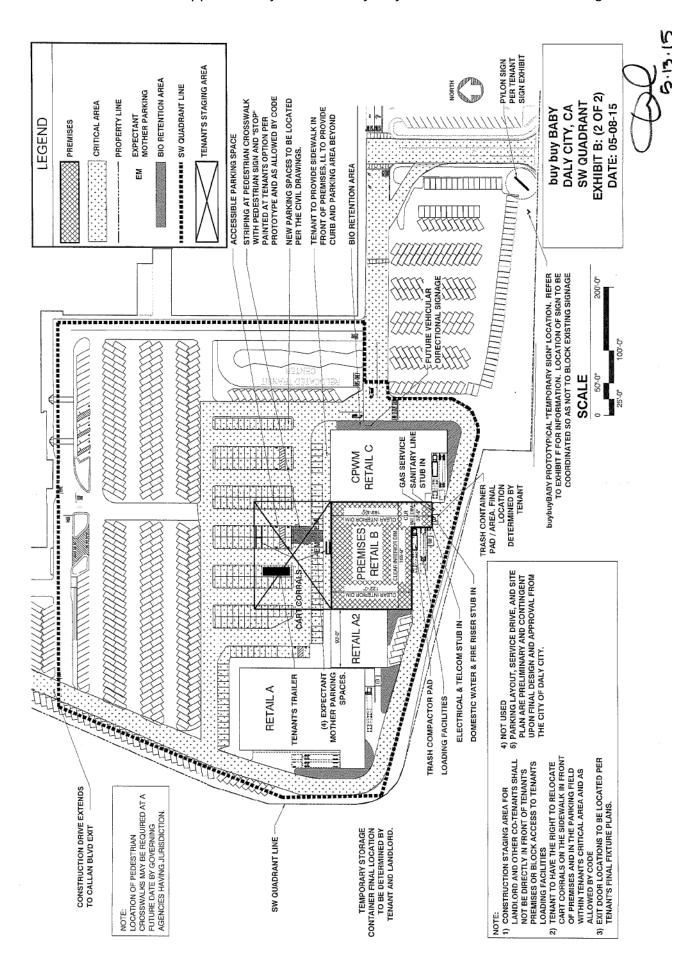
```
1
                                       Exhibit A
 2
                            Legal Description of Shopping Center
 3
      All that certain real property situated in the County of San Mateo, State
 4
      of California, described as follows:
 5
 6
      City of Daly City
 7
 8
      TRACT ONE:
 9
10
      COMMENCING AT THE MOST WESTERLY TERMINUS OF THAT CERTAIN
      CURVE HAVING A RADIUS OF 2151.17 FEET; A CENTRAL ANGLE OF
11
      10°11'45", AN ARC DISTANCE OF 382.80 FEET AS SAID CURVE FORMS A
12
13
      PORTION OF THE SOUTHERLY BOUNDARY LINE OF BLOCK 36. IN
      SERRAMONTE, UNIT NO. 7, DALY CITY, CALIFORNIA, FILED FOR RECORD
14
15
      JANUARY 25, 1967 IN BOOK 66 OF MAPS AT PAGES 8 TO 11 INCLUSIVE,
      SAN MATEO COUNTY RECORDS: THENCE NORTH 28°55'53" EAST 921.22
16
      FEET TO THE POINT OF BEGINNING OF THE PARCEL TO BE DESCRIBED;
17
18
      THENCE NORTH 84°45' WEST 224.00 FEET; THENCE NORTH 5°15' EAST
19
      335.00 FEET; THENCE SOUTH 84°45' EAST 224.00 FEET; THENCE SOUTH
20
      5°15' WEST 335.00 FEET TO THE POINT OF BEGINNING.
21
22
      JOINT PLANT NO. 091-024-240-25A
23
      ASSESSOR'S PARCEL NO. 091-240-250
24
25
     TRACT TWO:
26
27
     ALL OF BLOCK 36, AS SHOWN ON THE MAP OF SERRAMONTE UNIT NO. 7,
28
     AS FILED JANUARY 25, 1967, IN BOOK 66 OF MAPS, AT PAGES 8, 9, 10
29
     AND 11, SAN MATEO COUNTY RECORDS.
30
     EXCEPTING THEREFROM THE PARCEL AT THE NORTHEAST CORNER OF
31
     SERRAMONTE BOULEVARD AND GELLERT BOULEVARD (EXTENDING
32
     NORTH), CONVEYED TO UNION OIL COMPANY OF CALIFORNIA, BY DEED
33
34
     RECORDED NOVEMBER 10, 1970, IN BOOK 5857, AT PAGE 227
35
     (60535AD), OFFICIAL RECORDS OF SAN MATEO COUNTY, DESCRIBED AS
36
     FOLLOWS:
37
38
     BEGINNING AT A POINT ON THE NORTHERLY LINE OF SERRAMONTE
39
     BOULEVARD AS SHOWN ON THE ABOVE MENTIONED MAP, SAID POINT
40
     BEING DISTANT THEREON SOUTH 80° 56' 33" WEST, 25.72 FEET FROM
41
     THE EASTERLY EXTREMITY OF THE NORTHERLY LINE OF SERRAMONTE
     BOULEVARD; THENCE FROM SAID POINT OF BEGINNING, NORTH 05° 15'
42
43
     WEST, 135.64 FEET; THENCE NORTH 84° 45' WEST, 152.56 FEET;
     THENCE SOUTH 05° 15' EAST, 130.67 FEET; THENCE ALONG THE ARC OF
44
     A CURVE TO THE LEFT, TANGENT TO THE PRECEDING COURSE, HAVING A
45
46
     RADIUS OF 40 FEET, A CENTRAL ANGLE OF 93° 48' 27", AN ARC
47
     DISTANCE OF 65.49 FEET TO THE NORTHERLY LINE OF SERRAMONTE
48
     BOULEVARD; THENCE ALONG SAID LINE, NORTH 80° 56' 33" EAST,
49
     107.58 FEET TO THE POINT OF BEGINNING.
50
51
     FURTHER EXCEPTING THEREFROM, ALL THAT PORTION OF THE ABOVE
52
     DESCRIBED PROPERTY CONVEYED BY DEED RECORDED JULY 22, 2005,
53
     INSTRUMENT NO. 2005-123837, OFFICIAL RECORDS WITHIN THE
     FOLLOWING DESCRIPTION:
54
55
     PARCEL 1 OF THAT CERTAIN PARCEL MAP RECORDED ON MAY 19, 2005
56
57
     AS INSTRUMENT NO. 2005-900082, IN BOOK 76 OF PARCEL MAPS AT
58
     PAGES 24 AND 25, SAN MATEO COUNTY RECORDS.
59
     FURTHER EXCEPTING THEREFROM ANY PORTION LYING WITHIN TRACT
```

```
ONE DESCRIBED ABOVE.
 2
 3
      JOINT PLANT NOS.:
 4
 5
      091-024-240-07A
 6
      091-024-240-09A
 7
      091-024-240-32A
 8
      091-024-240-31A
 9
      091-024-240-12A
10
      091-024-240-13A
11
      091-024-240-30A
12
      091-024-240-16A
13
      091-024-240-17A
14
      091-024-240-18A
15
      091-024-240-19A
16
      091-024-240-21A
17
      091-024-240-22A
18
      091-024-240-23A
19
      091-024-240-26A
20
      091-024-240-27A
21
      091-024-240-28A
22
      091-024-240-29A
23
      091-024-240-08.01A
24
      091-024-240-08.02A
25
26
      APN: 091-240-070, 091-240-090, 091-240-100, 091-240-110, 091-240-
27
      120, 091-240-130, 091-240-150, 091-240-160, 091-240-170, 091-240-
      180, 091-240-190, 091-240-210, 091-240-220, 091-240-260, 091-240-
28
29
      270, 091-240-280, 091-240-300, 091-240-330, 091-240-230
```

Case 23-13359-VFP Doc 1532-1 Filed 07/26/23 Entered 07/26/23 17:31:53 Desc Exhibit Bell Declaration in Support of Objection of Daly City Serramonte Center Page 61 of 64

 1
 Exhibit B

 2
 Site Plan



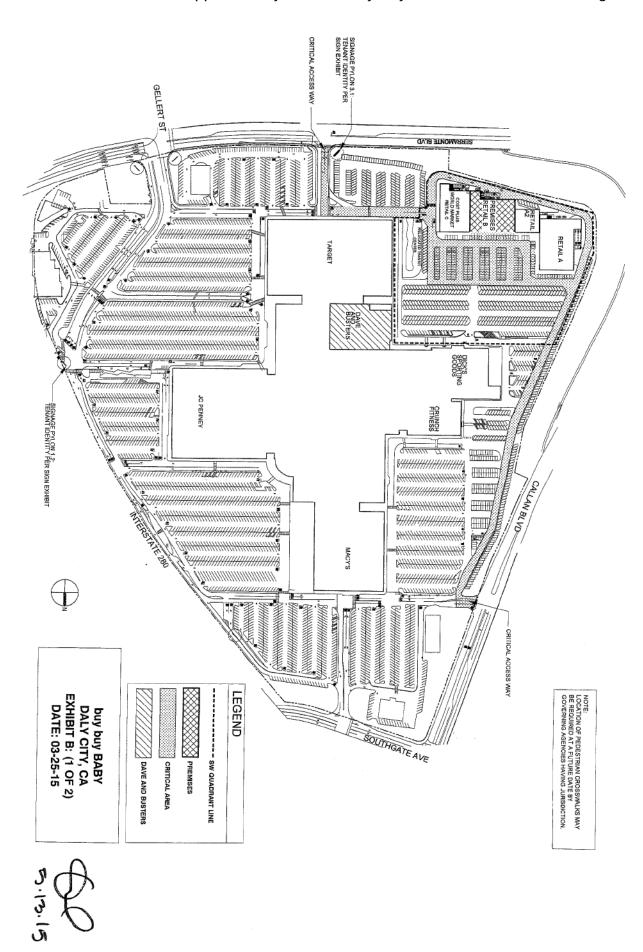


Exhibit B

Ross Lease

FILED UNDER SEAL